UNIVERSITY OF ALBERTA

THE STATE CONTRACT: PUBLIC POWER AND PRIVATE OBLIGATION

BY

SHANNON KATHLEEEN O'BYRNE ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

FACULTY OF LAW

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "The State Contract: Public Power and Private Obligation," submitted by Shannon Kathleen O'Byrne in partial fulfilment of the requirements for the degree of Master of Laws.

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This thesis is for James, Kerry, and Sean McGinnis

ABSTRACT

This thesis concerns Crown contracts and how they are conceptualized. It begins with the preliminary project of determining the important qualities of the Canadian State in order to understand better the nature of its contractual commitments. Chapter One, therefore, explores the relationship between individual and State; it eschews the traditional juristic theory of the State in favour of a meta-theoretical one. Meta-theory regards the State concept as comprising action and reflection, idea and practice, form and substance. It locates the State in both its institutional conduct and in the values and distinctive qualities which are ascribed to the State independently of what it does.[1] Chapter One offers no comprehensive theory of the State but does explore its important constituents, namely, an instrumentally conceived Rule of Law and other modern liberal democratic constructs.

This thesis also analyzes the private law model which purportedly governs the Crown contract. Chapter Two challenges the conceptual soundness of the model in light of State theory and questions the model's descriptive accuracy. It specifically attacks the governing assumption that the State can be likened to a private individual or corporation when it is in the market-place. Chapter Two illustrates how this assumption is contrary to the liberal democratic underpinnings of the Canadian State and how it generates false conclusions regarding the State's freedom of contract and the individual's equality of bargaining. It concludes that the private law model is

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[1] For a discussion of the State concept as being comprised of both idea and institution, see Kenneth Dyson, The State Tradition in Western Europe: A Study of an Idea and Institution (Oxford: Martin Robertson, 1980).

dissipative, unsystematic and largely unsuccessful.

In the final Chapter, a public law model of the Crown's contractual liability is offered. Within the context provided by the idea of the Canadian State, the proposed model identifies a fundamental contractual objective to be the promotion of the common good in a manner which is consistent with preservation of the liberal democratic relationship between State and individual contractor. It is argued that preservation of this latter relationship is achieved first, by identifying a normative ordering--derived from the idea of the Canadian State and relational contract law theory--which binds the State in the market-place; second, by formulating rules based on that ordering; and third, by acknowledging the inevitable political content in subjecting to judicial review the State's contractual conduct.

This thesis concludes that through a public law strategy, it is possible for the law of Crown liability to become systematic and unified. This is because a public law model--by preserving the State's identity even in contract--generates an essential liberal-democratic symmetry between the idea of the Canadian State and its institutional conduct.

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THE STATE CONTRACT: PUBLIC POWER AND PRIVATE OBLIGATION

INTRODUCTION

The Crown contract has traditionally been regarded as a private law matter. In ostensible fulfilment of the Rule of Law,[1] the model treats the Crown as if it had a private analogue and so declines to recognize its status as governor when it is in the market-place. Everyone, of whatever "rank" or "condition," is thereby subject to the same law.[2]

The Law Reform Commission of Ontario has recently produced a report on Crown liability which encapsulates the spirit of the private law model. It writes:

> The Commission has concluded that the application of the ordinary law by the ordinary courts to the activities of government not only conforms to a widely-held political ideal but also preserves us from many practical problems.....In our view, the case for retention of the ordinary principles of common law to govern issues concerning the liability of the Crown is overwhelming.[3]

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[1] The private law model insists that the same contractual rules which constrain the individual also apply to the Crown. This embodies Dicey's assertion that the Rule of Law subjects everyone to the "ordinary law of the realm." See Dicey, Introduction to the Study of the Law of the Constitution (7th ed.) (London: MacMillan and Co. Ltd., 1908) at 189. Dicey's first edition was published in 1885.

For discussion of Dicey's influence in the modern law of Crown liability, see the Ontario Law Reform Commission, Report on the Liability of the Crown (Toronto: Law Reform Commission of Canada, 1989) at 2-3 and the Law Reform Commission of Canada, The Legal Status of the Federal Administration (Working Paper No. 40)(Toronto: Law Reform Commission of Canada, 1985) at 10-12. See also David Cohen's critique of the Law Reform Commission of Canada's understanding of Dicey's Rule of Law in "Thinking About the State: Law Reform and the Crown in Canada" (1987) 24 Osgoode Hall Law Journal 379 at 388-392.

[2] See Dicey, ibid.

[3] Supra note 1 at 5.

It is my contention, by way of contrast, that the private law model is an inadequate tool for resolving individual-State disputes because it conceals important features of the Crown contract. For instance, because the model insists on the presence of a private analogue for the Crown, it submerges the Crown's ongoing coercive resources and liberal democratic duties of governance. Because it submerges the limits which liberal democratic theory places on the Crown's freedom of contract, it concludes that the individual and State are contractually constrained in largely equivalent ways. Because it only recognizes extreme forms of inequality, it assumes that the individual shares an equality of bargaining with the Crown. Most critically, by insisting on an analogue, the model submerges the importance of political theory in resolving conflicts between individual and State. It denies the connection between how the Canadian State is conceptualized, on the one hand, and the nature of Crown liability, on the other.

In this thesis, I analyze several matters which the private law model does not recognize as significant. In Chapter One, I begin the preliminary project of defining what the Canadian State is in order to locate the quality of its contractual obligations. Given the absence of a theory of the State in Anglo-American countries--including Canada--this Chapter relies on a Western continental European model and identifies two important constituents of the Canadian State: an instrumentally conceived Rule of Law and modern liberal democratic values.

In Chapter Two, I explore the private law model of the Crown contract. This model does not reference questions of Crown liability against the idea of the Canadian State because, as discussed earlier, it regards the Crown as having a private analogue. I will show, however, that the private law model produces a specialized public law system nonetheless and one which--by arising in spite of itself--is unsystematic, dissipative and unequal to its task of mediating the individual-State relationship.

In Chapter Three, I argue for a theory of Crown liability which seeks to remedy the deficiencies of the private law model discussed in Chapter Two. The first step is to accept that the State has no private analogue. The second step is to acknowledge the inevitable project of ranking competing public and private interests in the Crown contract. The third step is to accept an express role for political theory in the development of Canadian public law. This means binding the Crown to an overarching normative ordering because liberal democratic theory--a cornerstone of the Canadian State--preserves the Crown's status as governor even when it is in the market-place. The fourth step is to derive specific rules governing the Crown's contractual relationships through reference to this normative, politicised ordering.

The strategy of politicisation proposed in Chapter Three is doubtless contentious given Dicey's latent influence in the modern Canadian State. But within the wider context provided by countries which have an expressly public law system to govern individual-State conflict, the role of political theory is more obvious than it is remarkable. As the French legal scholar, P. Weil, asserts:

> Administrative law is not, and cannot be, an area of law like any other...for it is an integral part of the study of political science which is concerned with the problems raised by relations between

> Government and the citizen, authority and freedom, society and the individual.[4]

Before turning to the matter of State theory, a few comments are required on terminology used throughout this thesis.

First, it must be decided what is meant by the "Crown." There is much academic debate on this point,[5] which I do not propose to resolve here. Instead, I will favour the most common definition of the Crown identified by the Law Reform Commission of Canada, namely, "an institution symbolizing two aspects of the State, the Monarch and the Executive."[6]

Next, it must be decided how to distinguish between the Crown as executive and the Crown as a symbol of the Canadian State. I will therefore refer to the Crown in its executive capacity as the Government or the State--terminology favoured for its directness and avoidance of outdated monarchical concepts.[7] Further, "Government" is a term already advocated by Lord Diplock who asserted in 1978 that:

> to continue nowadays to speak of "the Crown" as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion....Where...we are concerned

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[4] Le droit administratif, quoted by the Law Reform Commission of Canada, supra note 1 at n.p.

[5] See the Law Reform Commission of Canada's summary, ibid at 24-31.

[6] Ibid at 25.

[7] See Cohen, supra note 1 at 383 and the Law Reform Commission of Canada, ibid at 5. Further, as the Commission points out, use of the word "Crown" to encapsulate the State's executive function is deceptive as it tends to "conceal the transfer of the executive function from the person of the Monarch to a Government responsible to Parliament," at 5.

> with the legal nature of the exercise of executive powers of government, I believe that some of the more Athanasian-like features of the debate in your Lordships' House could have been eliminated if instead of speaking of "the Crown" we were to speak of "the government"--a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by "the Crown" in the fictional sense in which that expression is now used in English public law.[8]

On the other hand, the word "Crown" will be cast as a cumulative term encompassing the State, the Head of State, the Executive, the Government, the Administration and the machinery of justice derived from the Crown.[9]

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[8] Town Investments Ltd. v. Department of the Environment [1978] A.C. 359 at 380-81 (H.L.). This passage has been referred to with approval in The Queen v. CAE Industries Ltd. (1985) 20 D.L.R. (4th) 347 at 369, footnote 2 (F.C.A.), leave to appeal to the Supreme Court of Canada refused, (1985) 20 D.L.R. (4th) 347n.

[9] The Law Reform Commission of Canada, supra note 1 at 25, notes that the Crown represents all these functions within the British tradition.

CHAPTER ONE: TOWARDS A THEORY OF THE CANADIAN STATE

INTRODUCTION

The traditional strategy of Canadian legal scholars has been to make do with a juristic theory of the State.[1] This means regarding the Canadian State independently from the sociological, political and intellectual activity which produces it and so to see the State as being contained in, described by, and coextensive with an organization of legal structures. Accordingly, the State is only considered within the context of those formalized and definition producing rules, procedures, regulations, systems, and orderings which constrain it. While it is generally acknowledged that principles contained in rules qualify the exercise of power so as to ensure that the State does not behave in an arbitrary, though technically legal fashion,[2] this acknowledgement is rather more a tacit assumption than it is a matter for analysis. There is no exploration of the relationship between individual and State, no attempt to identify "the framework of values within which public life should be conducted,"[3] no attempt to understand the Canadian State as an integrated, multifaceted concept. Indeed, and as a result, many Canadian legal scholars tend not to distinguish between State and law; the coextension is so patent, it seems, that they perceive no need even to acknowledge the distinction if only to dismiss it.[4]

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[1] The traditional strategy is not the exclusive one, however. The University of Toronto, for example, has recently produced a special issue on administrative law wherein several of its contributors distance themselves from overly juristic constructions. Nonetheless, these scholars remain in the minority. See (1990) 40 University of Toronto Law Journal 305-670.

[2] For more on this point, see Alexander d'Entreves's account of the difference between legality and legitimacy in The Notion of the State: An Introduction to Political Theory (Oxford: Clarendon, 1967) at 141-152 and 304.

[3] Kenneth Dyson, The State Tradition in Western Europe: A Study of an Idea and Institution (Oxford: Martin Robertson, 1980) at 271.

While instances could be duplicated, it is a sufficient illustration to review Peter Hogg's perspective on constitutional law, an area where--if it ever were to happen at all--one would expect some discussion of how the Canadian State might be construed and the extent to which such understandings coincide with case law and political theory. But Hogg only approaches the idea of the State doctrinally and formally. This is clearly revealed in the instrumental definition he provides of constitutional law as "rules prescribing the exercise of power by the organs of the

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[4] Further, when the State is regarded as an entity, there is still an understandable tendency to over-emphasize the conflation of State and society, as in the work of Alan Cairns, or to limit analysis to the impact of federalism alone, as in the work of Smiley and Watts. See, for example, Cairns, "The Embedded State: State-Society Relations in Canada" in Keith Banting (ed.) State and Society: Canada in Comparative Perspective (Toronto: University of Toronto Press, 1986) and Smiley and Watts, Intrastate Federalism in Canada (Toronto: University of Toronto Press, 1985) at 53.

On conflating the distinction between State and society, Eric Nordlinger asserts:

> The pervasive grip of the society-centred perspective helps explicate the common absence of a clear and consistent state-society distinction. It has also resulted in a conception of the state as little more than an arena within which societal conflicts are fought out, interests mediated, and ensuring results authoritatively confirmed.

See On the Autonomy of the Democratic State (Cambridge: Harvard University Press, 1981) at 5. Also at 5, he asserts:

> only by drawing the state-society distinction does it become possible to assess the impact of the state upon public policy independently of the constraints and supports of societal actors, and thereby allow a case to be made for its autonomy.

State."[5] Beyond recognizing the constitution as "a mirror reflecting the national soul,"[6] Hogg does not explore the ideas behind the rules. This silence is not inadvertent but axiomatic: in Hogg's construction, the State is no more or less than those things by which it is regulated.[7] But we must look behind the rules in order to understand them because the Canadian State is not just about a technically legal and procedurally correct exercise of power. Indeed, a strictly legal analysis fails to acknowledge that laws are made by people who wish to regulate their relations to achieve "certain ends;"[8] it fails to see how the State is not a "neutral executor mechanically implementing societal choices and choosing among competing demands by some agreed calculus;"[9] or a "neutral institution...[which has] arisen out of pure chance or accident."[10] The State must be about something more than law because Canadian institutions create "problems of rule and are not to be understood exhaustively by describing their formal structures or the patterns of interaction within them."[11] It must be about something more because the conduct of Government is subject to review against normative standards we can identify.

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[5] Peter Hogg, Constitutional Law of Canada (2nd ed.) (Toronto: Carswell, 1985) at 1. This definition is not far removed from one offered by Dicey at the turn of the century:

> Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state [footnotes deleted.]

See A.V. Dicey, Introduction to the Study of the Law of the Constitution (7th ed.) (London: MacMillan and Co. Ltd., 1908) at 22, first published in 1885.

[6] Ibid, quoting R.I. Cheffins and R.N. Tucker, The Constitutional Process (2nd ed.) (Toronto: McGraw-Hill of Canada, 1975).

[7] It should be noted that Neil Finkelstein, in Laskin's Canadian Constitutional Law (5th ed.) (Toronto: Carswell, 1986) follows Hogg's doctrinal lead as do Anne Bayefsy and Mary Eberts in Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) and Barry Strayer in The Canadian Constitution and the Courts (Toronto: Butterworths, 1988), among others. There is no regard for the possibility of any part of the State existing independently of its structures. The State is constructed as being that by which it is governed and vice versa.

While, of course, as all the foregoing books concern law, one would expect a good deal of simple legal discussion. However, particularly given the subject matter, one would also expect analysis of the principles informing the rules and an evaluation of their conformity to the requirements of democratic liberal theory and other standards of political legitimacy.

[8] d'Entreves, supra note 2 at 3. As Nordlinger asserts, supra note 4 at 9: "a conception of the state that does not have individuals at its core could lead directly into anthropomorphic and reification fallacies."

All this is to argue in favour of the possibility of producing a Canadian theory of the State, a theoretical endeavour which has been long outstanding.[12] But to argue in favour of the possibility is not to be blind to the enormous difficulties associated with producing a theory of the State. Indeed, the notion of the "State" is subject to contestation because it seeks agreement on fundamental antecedents such as matters of method and questions of epistemology; it seeks agreement on the nature of power and its exercise; it seeks agreement on the essence of humankind[13] and on the quality of public authority. Further, even with a level of agreement on these matters, the nature of a given State must be interpreted within the context of the ideological tradition with which it combines.[14] In sum, the whole project is subject to derailment at any point because the State "involves problems of meaning and application."[15] For this reason, discussion of the concept of the State imports an intellectual vulnerability openly acknowledged by scholars in the field.[16]

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[9] Cairns, supra note 4 at 58.

[10] Andrew Vincent, Theories of the State (Oxford: Basil-Blackwell Ltd., 1987) at 3.

[11] Dyson, supra note 3 at 6.

[12] David Cohen, "Thinking about the State: Law Reform and the Crown in Canada" (1987) 24 Osgoode Hall Law Journal 279 at 381, footnote 4, notes that Canada still does not have a theory of the State produced in the English language. The Law Reform Commission of Canada, The Legal Status of the Federal Administration (Working Paper No. 40) (Ottawa: Law Reform Commission of Canada, 1985) at 89-100 lists several French language works regarding the State.

[13] C.B. Macpherson in "Do We Need a Theory of the State" (1977) XVIII Arch. Europ. Socio. 223 at 224 writes: "The hallmark of the grand theories [of the State] is that they all tied the state back to supposed essentially human purposes and (continued...)

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[13] (...continued)
capacities, to a supposed essential nature of man." Vincent, supra note 10, remarks that while there is no single conclusion to be derived from one's view of human nature, nonetheless, the political theorist "will want to tie in the account of human beings with the structure of political arrangements" at 43. G. Duncan, "Political Theory and Human Nature" in I. Forbes and S. Smith (eds.), Politics and Human Nature (London: Francis Pinter, 1983) and quoted in Vincent, supra note 10, at 43 asserts that "at the centre of political theory lies the effort to establish a relationship between human nature, however that is conceived, and the State."

[14] Dyson, supra note 3 at 255, attributes part of the elusive quality of the State as resulting from the numerous ideological manifestations it is capable of assuming. Speaking more theoretically, Robert Alford and Roger Friedland, Powers of Theory: Capitalism, the State, and Democracy, (Cambridge: Cambridge University Press, 1985) at 3, remark that because the State can be regarded from the perspective of the individual, from the perspective of organizations, from the perspective of society--as well as interperspectively--the meaning of "State" is contingent.

[15] Dyson, supra note 3 at 252.

[16] For example, Dyson, ibid, remarks that his book, The State Tradition in Western Europe, was not easy to write: "Indeed, colleagues have frequently revealed by their facial expressions (rather than by unkind words of discouragement) a feeling that I was embarking on a hazardous enterprise" at vii. d'Entreves, supra note 2 at 148 makes a similar point:

> The search for a legitimate basis of power is not an empty and senseless search...A theory of the state which takes no account of it is necessarily incomplete. It is no use protesting that such notions as legitimacy or authority are emotionally loaded, that they are at bottom irrational and certainly incapable of definition with the precision and severity of scientific language. This emotional and irrational character has never been denied by those few thinkers who have been inclined

(continued...)

In the following Chapter, therefore, I propose only to contribute to the project by providing some prefatory and prolegomenary analysis. The first section of this paper seeks to provide a meta-theoretical framework within which a theory of the Canadian State might be constructed. The second section attempts to account for the absence of State theory in Canada. The third section takes an initial step in producing a theory of the Canadian State by identifying two of its central, constitutive elements, namely an instrumentally conceived Rule of Law and the concomitant prescriptions of liberal democratic constructs. I will argue that these two elements generate a fluctuating set of public values which mandatorily constrain executive, legislative and judicial conduct and so provide symmetry to individual-State relations in Canada.

I. META-THEORY

In The State Tradition in Western Europe: A Study of an Idea and Institution, German theorist Kenneth Dyson describes the fearlessly meta-theoretical approach of Western continental Europe to the State notion. In this tradition, the

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[16](...continued)

> to investigate the idea of legitimacy, and to take it more seriously than a mere ideology, a political formula, or a noble lie.

Even the merely institutional State cannot be definitionally isolated. See Alan Cairns' comment in "The Nature of the Administrative State," (1990) 40 University of Toronto Law Journal 319 at 322:

> The attempt to pin down the contemporary administrative state is doomed to failure. Its very boundaries become unclear as the state increasingly involves numerous private actors in its pursuit of goals by joint venture, contract compliance in the service of disadvantaged minorities, and extensive and discretionary funding of many of the pressure groups.

State is seen as being produced by or contained in the interconstitutive relationship of State institution, on the one hand, and State idea, on the other. Dyson distinguishes between the institution and idea which comprise the State notion as follows:

> The notion of the state is neither a passive reflection, nor a determinant, of political conduct. Being in part constitutive of political activity and of the [institution of the] state itself, the idea of the state is connected in an intimate, complex and internal way with that conduct, shaped by and shaping it, manipulated by and imprisoning the political actor whose political world is defined in its terms.[17]

This is meta-theoretical argument: the notion of the State is presented as neither merely active nor merely passive but as involving a relationship between action and reflection, between institution and idea.[18] Dyson's position is that "ideas do reflect political activity" but not merely as "expedients or reflexes of political practice."[19] This is because people "are as much prisoners as manipulators of the ideas by which they seek to explain and legitimate their actions."[20] Accordingly, to understand the State, one must accept that it is more than governmental apparatus and political decision-making: it is "partly constituted by the beliefs that people hold about it."[21]

Approaching the State meta-theoretically means accepting that the State is not understood merely by isolating bureaucratic and political behaviour, or discussing the power struggles borne of federalism or analyzing Canadian statutory law. Adopting a Western continental European strategy means acknowledging the value in exploring pre-existing perspectives on what the State is; it means taking the position that standards influence official behaviour and vice versa. It necessarily requires locating the State notion beyond idea and institution because one accepts that the State is comprised of both.

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[17] Dyson, supra note 3 at 2-3.

[18] Dyson's strategy here has much in common with Terry Eagleton's assertion that "just as all social life is theoretical so all theory is real social practise." See The Significance of Theory and Other Essays (Oxford: Basil Blackwell, 1990) at 24.

[19] Dyson, supra note 3 at 2.

[20] Ibid.

[21] Ibid at 3.

A meta-theoretical concept of the State is far removed from the traditional, doctrinal analysis of the institutional State as it is commonly understood. To recognize a layered notion of the State, to venture beyond the State's obvious physical and legal connotation and consider it as a ""lived" historical and socio-cultural phenomenon"[22] has never been a strategy amongst English-speaking theorists.[23] This absence, I will argue in the next section, must be considered a deficiency because the notion of the Canadian State clearly exists and is contained, partially at least, in the conduct of bureaucrats and politicians; in the reasons for which they choose to so conduct themselves; in the liberal democratically imbued measure or standard against which that conduct is evaluated; and, in the unities and tensions generated by these constitutive elements. If this argument can be made successfully, it means that Canada participates, albeit with greater attenuation, in a kind of State concept normally only associated with Western European countries, a concept which involves:

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[22] Ibid at 4.

[23] J.P. Nattl, "The State as a Conceptual Variable" (1968) World Politics 559, quoted in Dyson, supra note 3 at 4.

> a body of values, powers, procedures and offices; [it] represents a concern for logic and order in collective arrangements. Its emphasis is upon the autonomous exercise of public authority under law...upon the unity of such authority, a monism that suggests the distinctive character of public affairs; upon technical criteria and professionalism of bureaucratic mores rather than group conflict and adjustment; and upon an essentially moral, substantive concept of the public interest that is not viewed as simply emerging from a pluralist process in which groups openly compete.[24]

II. THE ABSENCE OF THEORY

It is the case that the concept of the State has been regarded suspiciously, if at all, by English-speaking theorists. Indeed, their "academic climate has been generally unreceptive to any general discussion on the nature of the State."[25] Even in Europe, a continent in which the concept of the State has genuine cultural resonance, the matter has only recently regained its former significance as a component in political and social theory.[26] I now propose to explore the Anglo-American disregard for the State concept which--given historical and geographical proximities[27]--provides reasons for the absence of a Canadian theory as well. My account of the Anglo-American perspective will be partial by necessity; a full discussion would require a prolonged interpretation of philosophical, social, historical and political directions which influenced scholars both to generate and follow certain theoretical paths. Further, an explanation for the absence of a theory of the Canadian State is not pivotal to the integrity of the limited State theory which I will offer later in this Chapter--the mere absence of a theory cannot, without more, prove that a subsequently generated one lacks viability. The following comments are simply intended to place into context my own project and to suggest that reflexive tendencies to dismiss the concept of the State are the result of contingencies unrelated to the integrity of the concept itself.

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[24] Dyson, ibid at 270.

[25] Vincent, supra note 10 at 1. See also Dyson, ibid at 4.

[26] John Keane, Civil Society and the State: New European Perspectives (London: Verso, 1988) at 1.

[27] Paul Romney in "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture," (1989) 7 Law and History Review 121 explores certain of the political, economic and cultural influences which Great Britain and the United States have had on Canada. He notes, among other matters, that Canada's political culture is the complex product of the "North Atlantic Triangle," which references Canada's relationship to the United States and Great Britain. See his discussion of J.B. Brebner, The North American Triangle: The Interplay of Canada, the United States, and Great Britain (New Haven, 1945) at 174.

A primary cause for neglect of the State concept in the Anglo-American tradition lies in the real and perceived conflict between the idea of the State and the informing principles of democratic liberalism. That the power of the merely institutional State cannot be fully reconciled with the liberal based sovereignty of each citizen is problematic enough[28]--when the idea of the State is superimposed onto the institutional one, the assailability of the individual and the spectre of totalitarianism appear heightened. Indeed, the idea of the State has been linked to problems profoundly antagonistic to liberal democratic constructs, including: dictatorial elites;[29] a reduced competitive function in political parties and the legislative branch of the State;[30] intolerance of dissent and a refusal to accommodate special interests,[31] the growth of an overly bureaucratized, formalized and hierarchial administration;[32] depoliticisation resulting from constraints placed both on governmental rule and politicking presumed to emanate from that idea;[33] and the growth of intellectual despotism[34] the force of which is premised on a dictatorial interpretation and imposition regarding the content of that idea.

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[28] Quentin Skinner, "The State" in Terence Ball and James Farr (eds.) Political Innovation and Conceptual Change (Cambridge: Cambridge University Press, 1989) 90 at 122.

[29] Dyson, supra note 3 at 257.

[30] Ibid at 259.

Related to the anti-statism of liberalism is the commonly evoked strategy of Anglo-American political philosophy to pay "considerable attention to particular concepts like democracy, equality, liberty, and social justice but not to an overarching concept of rule like state with reference to which these might be related."[35] The search for the cohesive element implied in the concept of the State is seen as either foolishly metaphysical--particularly in light of the growth of twentieth-century, Anglo-American empiricism and nominalism[36]--or foolishly diversionary because the exercise detracts attention from actual political or governmental conduct, a more common subject matter of Anglo-American analysis.[37] Further, the centre stage of liberal theorizing remains largely occupied by the rational, self-maximizing individual who axiomatically constitutes the starting point of any analysis and whose interests are considered paramount over collective ones.[38]

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[31] Ibid at 260.

[32] Ibid at 263.

[33] Ibid at 265.

[34] Ibid at 269.

[35] Ibid at 201. See a similar assessment by Vincent, supra note 10 at 2.

[36] Vincent, ibid at 2; Dyson, ibid note 3 at 199-200; d'Entreves, supra note 2 at 62-64. See also Klaus von Beyme's discussion in "The Role of the State and the Growth of Government" (1985) 6 International Political Science Review 11 at 12.

[37] d'Entreves, supra note 2 at 62; Dyson, ibid at 2 and 197.

In sum, the idea of the State has a contradictory, troubling quality in the context of traditional liberal democratic theory and method which even now militates against a complete understanding of what political consequences flow from accepting it. All of this leads Anglo-American jurisprudence away from acknowledging a fuller concept of the State.

Additional reasons contributing to the absence of a theory of the Canadian State relate to Canada's inheritance of certain confusing juristic traditions from Britain, the pluralist quality of Canadian society, and to the fact of Canadian federalism. As surveys by F.W. Maitland, Dyson, Skinner, and The Law Reform Commission of Canada show,[39] the British notion of State and Crown lacks a coherence which Canada--being a former British colony and still a titular monarchy--has largely inherited. First, to arrive at a modern concept of the State whereby power is understood as impersonal, that is, where an office of the State is seen as having an existence separate from and above the individual office-holder, itself involved a long historical journey beginning in the Renaissance[40] and summarized by Skinner in the following terms:

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[38] See John Gray, Concepts in Social Thought: Liberalism (Minneapolis: University of Minneapolis, 1986) at 55 wherein he references the rational, self-maximizing, possessive individual model in James Buchanan's Freedom in Constitutional Contract (College Station, Texas: Texas A&M University Press, 1977) and David Gautier's Morals by Agreement (Oxford: Oxford University Press, 1985). See Dyson's general discussion, ibid at 254 and also at 198-199 where he discusses the presence of this model in the work of modern liberal theorists such as Robert Nozick and John Rawls.

[39] F.W. Maitland, "The Crown as Corporation" (1901) 17 Law Quarterly Review 131; Dyson, supra note 3 at 36-37 and 210-211; Quentin Skinner, supra note 28; The Law Reform Commission of Canada, supra note 12 at 6-12.

> the idea that the supreme authority within a body politic should be identified as the authority of the state was originally the outcome of one particular theory of politics, a theory at once absolutist and secular-minded in its ideological allegiances. That theory was in turn the product of the earliest major counter-revolutionary movement within modern European history, the movement of reaction against the ideologies of popular sovereignty developed in the course of the French religious wars, and, subsequently, in the English Revolution of the seventeenth century. It is perhaps not surprising, therefore, to find that both the ideology of state power and the new terminology employed to express it provoked a series of doubts and criticisms that have never been altogether stilled.[41]

Some of the more significant doubts are illustrated in an analysis by F.W. Maitland showing the imperfect fusion which incorporation effected between State and Crown. Mincing no words, Maitland describes the Crown corporate concept as an abortive and mischievous trick:

> In the first place, the theory is never logically formulated even by those who are its inventors. We are taught that the king is two "persons," only to be taught that though he has "two bodies" and "two capacities" he "hath but one person." Any real and consistent severance of the two personalities would naturally have lead to "the damnable and damned opinion," productive of "execrable and detestable consequences," that allegiance is due to the corporation sole and not to the mortal man. In the second place, we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong and (says Blackstone) think no wrong; and such talk has not been innocuous...But in the third place, the theory of the two kings or two persons stubbornly refuses to do any real work in the cause of jurisprudence [footnotes deleted].[42]

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[40] Dyson ibid at 42.

[41] Skinner, supra note 28 at 121-122.

[42] Maitland, supra note 39 at 135. For Maitland, at 133, the modern British State emerged with Henry VIII's description of the English body politic. I quote from (continued...)

The relationship between the undeniable confusion Maitland identifies and the fact that English theorists have not pursued a theory of the State is, of course, impossible to establish. We do know that the "Crown" functions as symbol of the State in the British tradition but that it cannot do the job. We know it cannot do the job because the idea is perplexing, conveys no notion of nationhood and does not in any way "systematize the relationship of the individual to the state."[43] It may therefore be an idea which sustains only refractory analysis and so derails the formulation of a coherent State idea. This in turn, may account for the absence of Canadian State theory.

Second, and as referred to above, Canada has inherited the British common-law, Diceyan tendency to de-emphasize the separation between public and private law--particularly when contrasted to the Roman law influence in continental Europe through which the distinction becomes pivotal.[44] For Dicey, much of the Rule of

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[42](...continued)
Henry's declaration because it encapsulates one thread in the perplexing history of the British State. Henry VIII is reported to have said:

> Where by divers sundry old authentick histories and chronicles it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in the world, governed by One supreme Head and King, having the dignity and royal estate of the Imperial Crown of the same, unto whom a Body Politick, compact of all sorts and degrees of people and by names of Spirituality and Temporalty been bounden, and owne to bear, next to God, a natural and humble obedience.

Quoted by Maitland, at 133 (references deleted).

[43] Dyson supra note 3 at 40.

[44] Vincent, supra note 10 at 11. See too the Law Reform Commission of Canada, supra note 12 at 27.

Law--which includes the idea that every person, of whatever rank or condition "is subject to the ordinary law of the realm"[45]--must go to discounting the continental European argument of subjecting Government to a separate legal regime and holding it accountable to a separate court or tribunal. Dicey dismisses the French administrative approach, for example, as resting on "ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law."[46] The French droit administratif therefore "illustrates, by way of contrast, the full meaning of that absolute supremacy of the ordinary law of the land...which we have found to be a salient feature of English institutions."[47]

It should be noted that any attempt to dismiss out of hand the distinction between private and public law in Canada and Britain is at bottom fictional, given that, no matter what Dicey says, for centuries the British government has had a collection of special powers and immunities derived from its Crown status: it is not subject only to ordinary law.[48] Yet the Diceyan perspective still holds remarkably

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[45] Dicey, supra note 5 at 325.

[46] Ibid.

[47] Ibid at 330.

[48] See Peter Hogg, Liability of the Crown (2nd ed.) (Toronto: Carswell, 1989) for a discussion of these powers and immunities and his criticism of Dicey for failing to deal with them properly, at 3. Dicey, supra note 5 does acknowledge some points of contact between French droit administratif and the British common law, at 324-401 and in "The Development of Administrative Law in England," (1915) 31 Law Quarterly Review 148, he acknowledges even more.

Note too Dyson's comment, supra note 3, that in Britain "a characteristically medieval confusion of public and private responsibility remain. The common law system is caught up in a web of medieval government immunities and concepts which have not permitted the evolution of a coherent body of public law" at 234.

(continued...)

persistent theoretical sway notwithstanding its fictional quality and despite the fact that Canadian law does in fact recognize the public-private distinction. For example, at the end of the day, it is Dicey upon whom Hogg and the Ontario Law Reform Commission indirectly rely when they advocate that Government be regulated, for the most part, through private law principles.[49] My object at this point is not to debate the logic of their analysis but to argue that its effect is to perpetuate the continued ascription of a weak status to the Canadian State. Put another way, if we accept that public and private are very much the same, then the State cannot be about anything very distinct either. And so, again, the relative lack of theory about it.

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[48](...continued)
Notwithstanding, the Law Reform Commission of Canada remarks, supra note 12 at 11 that governmental powers and immunities in Canada actually "represent the beginnings of a separate body of administration law applicable to a large part of the Administration."

Note, finally, that the private-public distinction has also come under attack by members of the Critical Legal Studies Movement as being, at best, ill-thought out. In "Mice under a Chair: Democracy, Courts, and the Administrative State" (1990) 40 University of Toronto Law Journal 374, Allan Hutchinson provides a timely warning against "crude bifurcation" and notes that there are "similarities between the exercise of government and private power and their shared potential for abuse" at 377. Accordingly, it may be that we should expand our understanding of what constitutes the "public" to include corporations, as Hutchinson recommends at 377, in light of the huge impact they can have on individual lives. For the purposes of this Chapter, however, I accept that proposition that the public-private distinction is worth preserving in some form and that it is this distinction which makes rational governance possible. See Jeffrey Blum's discussion of rational governance in "Critical Legal Studies and the Rule of Law" (1990) 38 Buffalo Law Review 59 at 76-77. I discuss the distinction again in Chapter Three, infra.

[49] See Hogg, ibid at 3 and the Ontario Law Reform Commission, Report on the Liability of the Crown (Toronto: Ontario Law Reform Commission, 1989) at 2-3. Note that Hogg had conduct of the aforementioned report from its inception, at xiii.

Another account of why Canada has no theory of the State can be related to its composition. On federalism, Vincent makes the classic observation that it "encourages centrifugal forces, distinct legal structures and a general mistrust of centralism."[50] This generally acknowledged effect of federalism, when combined with significant post-war growth in the Canadian public sector,[51] a widely dispersed public authority,[52] and a pluralistic society the constitutionally enshrined multicultural quality of which manifests "the multiple politicized cleavages of modernity,"[53] results in a characterization of the Canadian State as "multiple, scattered and diffuse."[54] This reality leads scholars away from seeking to understand the Canadian State holistically and so, in turn, accounts for the relative absence of theory.

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[50] Vincent, supra note 10 at 11. It should be noted that Donald Smiley and Ronald Watts, supra note 4 at 1-4 are careful to criticize equally conceptions of federalism which either over or under-emphasize the effect of constitutional power divisions.

[51] Alan Cairns, supra note 4 at 56. Keith Banting in "Images of the Modern State" in State and Society: Canada in Comparative Perspective, supra note 4 at 2, remarks that the most usual measure for growth in the Canadian public sector is public expenditure as a proportion of the gross national product: "by this standard government spending in Canada has risen dramatically from 15.7 percent of our economic product in 1926 to 47.9 percent in 1983." Banting refers the reader to Statistics Canada, Historical Data Compendium, prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Ottawa: Statistics Canada, 1985) Table 5.12. See also Cairns's comment, supra note 16 at 325, in reference to the same Royal Commission report, that federal and provincial Crown corporations together actually may produce about 10 percent of the gross national product.

[52] Cairns, supra 4 note at 56, remarks on the fragmenting force of federalism, generating as it has:

> the more than 260 cabinet ministers and their departments of its 11 senior governments, and in a proliferation of government agencies and corporations only loosely connected to the traditional responsible government focus of executive authority. Countless programs, mostly old, occasionally new and frequently contradictory are applied by the thousands of separate bureaucratic units of the eleven governments. The result is a fragmented state with a fragmenting impact on society. Social actors are pulled in multiple directions by the scattering of state structures and policies.

But the foregoing explanation is offered only by way of background, not as apology or special pleading. Indeed, whatever one's objective, the concept of the State is ultimately not about consensus, as it cannot be,[55] nor is it determined by what the academic climate would have or not have us do. Accordingly, I propose simply to enter the debate and turn to a discussion of central components contained in the idea of the Canadian State.

III. THE IDEA OF THE CANADIAN STATE

In order to understand the idea of the Canadian State, I propose first to analyze the Rule of Law, realizing, of course, that, like the idea of the State, it is a heavily "contested concept."[56] I will then seek to identify liberal democratic values which affirm the dignity of the individual and which define the public interest. It is my position that these elements constrain the State and render its conduct subject to normative scrutiny.

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[53] Ibid.

[54] Ibid. Donald Smiley and Ronald Watts, supra note 4 at 1-2, make very similar observations regarding the Canadian State. Cairns also points out, supra note 4 at 62, that even government attempts to "shape a conception of community" have become politicised; this is clearly illustrated, he suggests, in the ongoing contest between the federal government and the province of Quebec for francophone allegiance.

[55] While a concept of the State seeks agreement over a diverse range of subjects, no such agreement is achievable. As Dyson, supra note 3 comments: "the state tradition is replete with internal disputes which can be traced back to its ideological ambiguity, its openness to reformulation and reinterpretation" at 254-255. See also Alford and Friedland, supra note 14 at xiii-xiv.

[56] See Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 Boston University Law Review 781 at 791.

The Rule of Law receives one of its earliest and most famous definitions by Dicey, who describes it as comprising three related concepts: first, no person "is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary manner before the ordinary Courts of the land."[57] Second, no person is "above the law, but (what is a different thing) [absolutely everyone] is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."[58] Third, "the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions."[59] It is the second arm of Dicey's formulation that most concerns us here.

Since Dicey's 1885 rendition, the Rule of Law concept has been subject to analysis by numerous theorists including, and without seeking to enumerate them, Sir

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[57] Dicey, supra note 5 at 183-184.

[58] Ibid at 189. Note that the Supreme Court of Canada in Re: Language Rights under Manitoba Act (1985) 19 D.L.R. (4th) 1 at 22 acknowledges the operation in Canada of a Diceyan Rule of Law:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.... Second, the rule of law requires the creation and maintenance of an actual order of positive laws.

[59] Ibid at 191.

Ivor Jennings,[60] and Sir William Holdsworth.[61] It assumes a libertarian incarnation in the work of F.A. Hayek[62] and, for Bernard Schwartz in Law and the Executive in Britain,[63] a normative and descriptive one. The Rule of Law appears as the exclusive object of study at a Chicago Colloquium in 1957[64] and a Warsaw Conference the following year.[65] It is regarded supra-nationally by Norman Marsh,[66] tied to legal efficiency by Lon Fuller,[67] posited as being integral to the idea of justice by John Rawls,[68] scrutinized from a Marxist perspective by British historian E.P Thompson,[69] contained by Joseph Raz,[70] "trashed" by the Critical

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[60] The Law and the Constitution (London: University of London Press, 1943), first published in 1933.

[61] Some Lessons from Our Legal History (New York: Macmillan, 1928).

[62] The Constitution of Liberty (Chicago: University of Chicago Press, 1960).

[63] Law and the Executive in Britain: A Comparative Study (New York: New York University Press, 1949).

[64] See Norman Marsh's discussion of this Colloquium in "The Rule of Law as a Supra-National Concept" in A.G. Guest (ed.) Oxford Essays in Jurisprudence 223 at 230.

[65] See Marsh's discussion, ibid at 235.

[66] Ibid.

[67] The Morality of Law (rev. ed.) (New Haven: Yale University Press, 1964) at 33-94.

[68] A Theory of Justice (Oxford: Oxford University Press, 1972) at 235-243.

[69] Whigs and Hunters: The Origin of the Black Act (London: Allen Lane, 1975).

[70] "The Rule of Law and Its Virtue," in The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979) 210.

Studies Movement,[71] retrieved by reform orientated liberals such as Jeffrey Blum[72] and reconsidered by Margaret Jane Radin within the context of Wittengensteinian philosophy.[73] But notwithstanding the diversity of treatment it has received, there has been some measure of agreement with respect to its modern formulation as being the "rule of law, not of men."[74]

Whether the foregoing phrase best contemplates a formalist or substantive model, however, has not produced the same consensus. Formalists--also known as instrumentalists--regard the Rule of Law as going to institutions and procedures[75] constraining the exercise of power so that State action will be predictable though not necessarily fair or just in substance. It is a purely formal ideal which the legal system of any kind of polity is competent to achieve.[76] Though the Rule of Law can produce a good,[77] it need not do so because the Rule is non-ideological. As Raz asserts:

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[71] See, for example, Allan Hutchinson and Patrick Monahan, "Democracy and the Rule of Law" in Allan Hutchinson and Patrick Monahan (eds.), The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987) 97. See also, Morton Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale Law Journal 561.

[72] Supra, note 48.

[73] Supra, note 56.

[74] See Hutchinson and Monahan, supra note 71 at ix. See also Radin, ibid at 781; Raz, supra note 70 at 212 and a comparable definition offered by Hayek in The Road to Serfdom, (Chicago: University of Chicago Press, 1944) at 54.

Like Radin, I shall define the Rule of Law as "the rule of law, not individuals," bearing in mind as she does that the original formulation proved accurate until quite recently because, until quite recently, only men had any part in political life.

[75] See Radin's discussion, ibid at 784-787 and Raz, supra note 70 at 210-229. See too Stephen Macedo, Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism (Oxford: Clarendon Press, 1990) at 10.

[76] Raz, ibid at 211.

> It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity [of people.][78]

Raz argues that the Rule of Law involves two principles: the making of specific laws must be "guided by open and relatively stable general rules"[79] and the law must be "capable of guiding the behaviour of its subjects."[80] On this reading, the Rule of Law is simply not limited to liberal democratic societies (although it is clear that liberal democratic societies would require the Rule of Law). Raz goes so far as to claim that the Rule of Law can be consistent with many forms of arbitrary rule: "A ruler can promote general rules based on whim or self-interest, etc., without offending the rule of law."[81] Radin sees things the same way when she states that the "instrumental conception is a model of government by rules to achieve the government's ends, whatever they may be."[82] A legal system will be consistent with the Rule of Law if it produces laws which are knowable and capable of being followed.[83] What interests or values the law promotes is an extraneous matter. Of course, instrumentalists would acknowledge that the Rule of Law operates within a political context and that the law which qualifies as such under the Rule of Law would in turn promote specific values; they simply deny that the Rule of Law itself carries any ideological baggage.

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[77] Thompson, supra note 69 at 265, asserts that "the reconciliation of conflicts through the Rule of Law--and the elaboration of rules and procedures... seems to me a cultural achievement of universal significance" at 265. Elsewhere, Thompson refers to the Rule of Law as "an unqualified human good," at 267.

[78] Supra note 70 at 211.

[79] Ibid at 213.

[80] Ibid at 214.

[81] Ibid at 219. It must be emphasized that while such rules may be in themselves whimsical, they could not be applied whimsically or be subject to excessive retroactive change and still be consistent with the Rule of Law.

[82] Radin, supra note 56 at 792.

Further, formalists regard the Rule of Law as competent to promote values under certain circumstances. It can found social relationships which otherwise would be "erratic" by rendering "law itself a stable and safe basis for individual planning."[84] This stability, in turn, produces a form of freedom which, while not political, is the result of a relatively predictable environment.[85] The Rule of Law also contemplates a kind of human dignity because its non-violation prevents "frustration" and "disappointed expectations."[86] On this model, the Rule of Law constitutes a negative virtue in that "conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which only could have been caused by the law itself."[87] And so, while the Rule of Law is morally neutral as to the object of a given law, it does promote essential features of any properly working legal system, namely efficiency,[88] the provision of effective guidance regarding the outcome of any given course of conduct[89] and legally enforceable remedies.[90]

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[83] Ibid at 786.

[84] Raz, supra note 70 at 220.

[85] Ibid.

[86] Ibid at 222.

[87] Ibid at 224.

One could charge the instrumental Rule of Law model with being unacceptably reductionist because, in liberal democracies at least, one does not simply seek to ensure efficiency, certainty, and the avoidance of disappointment and then assume all political work to have been accomplished. There are additional, more pressing values requiring respect and these are often regarded as being contained in the Rule of Law.

Those who advocate this latter, substantive account assert that the Rule of Law is consistent only with a free society[91] and accordingly, the State does not meet the Rule of Law standard simply by exercising power in a procedurally or formally correct fashion. In addition, the exercise of power must be "legitimate,"[92] that is, legally exercised and capable of substantive justification because the Rule of Law involves "positive content capable of being expressed in terms of fundamental values."[93] One common version of the substantive model is found in Hayek's contention that the Rule of Law should not be confined to mere legality because it:

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[88] Ibid at 226.

[89] Ibid at 218.

[90] Ibid.

[91] See Marsh's discussion, supra note 64 at 243 and that of d'Entreves, supra note 2 at 145-146.

[92] d'Entreves, ibid at 140.

[93] J.A. Jolowicz, "Digest of the Discussion--Chicago Colloquium on 'The Rule of Law as Understood in the West,'" in (1959) Annales de la Faculte de Droit d'Istamboul at ix, referred to by d'Entreves, supra note 2 at 145.

> presupposes complete legality, but this [legality] is not enough: if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all law conform to certain principles.[94]

And these principles are specifically liberal democratic ones. As earlier discussed, the liberal model of the individual tends to be that of the rational self-maximizer. Because each individual needs a "guaranteed sphere of liberty," classical liberals argue that "only a State conceived as a civil association, providing a general framework of over-arching rules (a rule of law), and restrained in its conduct"[95] can afford self-maximization of the individual. Accordingly, the Rule of Law is regarded as integral to promoting the negative liberty of classical liberalism advocated by John Rawls[96] (in that predictability and certainty and justice are required if people are to exercise the rational choice required for the good life.)[97] It is also seen as integral to promoting the positive liberty of reform liberalism encapsulated in the following quotation:

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[94] Hayek, supra note 62 at 205. See Raz's rebuttal, supra note 70 at 228, where he points out that what Hayek condemns as "arbitrary exercises of power" are, in fact, "perfectly principled particular orders."

It is worth noting too that Hayek's assertion misconstrues the Rule of Law on another basis. This is because a law which gave unlimited power to the government to do whatever it pleased would not, obviously enough, promote the certainty, efficiency and realized expectations which are integral to a properly functioning legal system and so would be contrary to the Rule of Law on an instrumental reading alone.

[95] Vincent, supra note 10 at 118.

[96] See Radin's discussion of Rawlsian liberty, supra note 56 at 789. She quite rightly asserts that while Rawls has an instrumentalist conception of the Rule of Law, he offers a substantive justification for it: "the Rule of Law is grounded not on the bare claim of efficiency of behaviour control, but on the specific vision of traditional liberalism. Liberty is the core value; overreaching by Leviathan is the danger on one hand, and disintegration of social cooperation...is the danger on the other" at 790.

[97] See Radin's discussion, ibid at 788.

> The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of...[the person] as an individual. This dignity requires not only the recognition of his [or her] civil and political rights but also the establishment of social, economic, educational and cultural conditions which are essential to the full development of his [or her] personality.[98]

Not surprisingly, advocates of the substantive model consider themselves empowered to evaluate government policy and law on normative grounds. Hayek, for example, argues that State interference with the economy is contrary to the Rule of Law,[99] not because of any procedurally incorrect aspect in gaining the legislative authority to so act, but because anything less than a free market economy is contrary to Hayek's vision of classical liberalism. Similarly, it is this model which permits Dicey to offer very specific conclusions regarding the permissibility of State provided goods and services[100] (they are not permissible) and the acceptability of specialized tribunals to deal with administrative matters (they are not acceptable)[101] as judged against the liberal principles he finds embedded in the Rule of Law. In sum, the substantive model regards the power of the State to be limited by both law and a "value" which is "inherent in the State and expressed in the law."[102]

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[98] Clause I of the report of Committee I of the International Congress of Jurists at New Delhi, 1959, quoted with derision by Raz, supra note 70, who describes it as a "perversion of the doctrine of the rule of law" at 210.

[99] See Hayek's discussion, supra note 62 at 227-28.

[100] Cohen, supra note 12 at 389.

[101] Dicey, supra note 5 at 193.

It should be clear by this point that the two models summarized above are not opposite but additive. Put another way, the substantive model contains the instrumental one while grafting on--and this is the difference between them--an absolute obligation on the State to obey liberal democratic constraints when exercising power. Does the strong relationship between these two models mean that we should also dismiss the distinction between them? For the purposes of this project, does it really matter whether one views the Canadian State as being constrained by one thing--the Rule of Law construed as inherently liberal--or by two things--an instrumental Rule of Law and its ideological content generated by liberal democratic constructs?

Theorists like Raz persuasively argue that the distinction between the models should be maintained if only because the substantive model leads to false conclusions. The central difficulty with the substantive description of the Rule of Law is that it mistakenly casts negative values as positive ones. For instance, the Rule of Law is often juxtaposed with the exercise of arbitrary power[103] when in fact it is more accurate to say that the Rule of Law, because it produces certainty with respect to how power will be exercised, helps to curb arbitrariness.[104] Similarly, the Rule of Law is said to protect individual freedom but again, this protection is simply the likely consequence of a legal system which produces predictability of result.[105] As yet another example, one can look to the claim that observance of the Rule of Law is intended to ensure respect for each person's human dignity.[106] Raz points out that observance of the Rule of Law produces no such axiomatic conclusion though it is clear that "deliberate violation of the rule of law violates human dignity."[107] In short, the Rule of Law enshrines negative values and so does not guarantee any political or social outcome; its non-observance, however--and this is where the two models coalesce--leads to a State which is contrary to liberal democratic values.

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[102] d'Entreves, supra note 2 at 3.

[103] See, for example, Radin's discussion of this traditional approach, supra note 56 at 781, Blum's, supra note 48 at 94 as well as Kenneth Henley's comment in "Protestant Hermeneutics and the Rule of Law: Gadamer and Dworkin," (1990) 3 Ratio Juris 14 at 26: "The rule of law is concerned with protecting people from arbitrary power."

By restricting the conclusions which can be drawn from essentially negative virtues, a divorce between the Rule of Law and ideology enables one to identify the purely political basis for the claims made by Hayek and Dicey referred to above. The instrumental model thus contributes significantly to the discussion regarding the Canadian State by highlighting the relationship--while denying any exclusive coextension--between liberal democratic values on the one hand and the certainty, efficiency, and predictability of a legal system operating in accordance with the Rule of Law on the other.

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[104] Raz, supra note 70 at 220; Blum, ibid at 94.

[105] Raz, ibid at 220-221.

[106] See, for example, the definition of the Rule of Law given by the International Congress of Jurists, supra at 31 of this Chapter.

[107] Raz, supra note 70 at 221-222.

Nonetheless, the instrumental model provides an incomplete account of the Rule of Law component in the Canadian State idea because it fails to acknowledge and adjust its own unarticulated predicates.[108] And indeed, the predicates are significant. The model assumes, first, that there is a formal or foundational connection between a rule and its application;[109] second, that there is an analytic connection between a word and its meaning;[110] and third, that rules exist prior to and apart from human conduct.[111]

Radin proposes a way of remedying these problems through reliance on a Wittegensteinian conception of rules. This is to retrieve their possibility by regarding rules both as a

> social and practice conception. It is a social conception because in this view rules depend essentially on social context, and it is a practice conception because rules also depend essentially on reiterated human activity."[112]

On this reading therefore, the Rule of Law is a social practise[113] which acknowledges that "every time we follow a rule we make it."[114] It requires an antiformalist construct: each and every rule is contingent;[115] each and every rule is socially constructed.[116]

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[108] Radin also quite rightly shows that both the substantive and procedural Rule of Law models are guilty of relying on extreme formalism. See her discussion, supra note 56 at 792-797. Because I will rely on the procedural model for the purposes of my own work, I do not propose to return to an analysis of the substantive model in this paper.

[109] Radin, ibid at 793.

[110] Ibid at 794.

[111] Ibid at 795.

[112] Ibid at 797.

[113] Ibid at 799.

[114] Ibid at 807.

Does this modified instrumentalist approach carry with it the conclusion that a Rule of Law cannot really exist at all? If rules are contingent, if rules are made even while they are being applied, if rules cannot be fully separated from the particular circumstances which seem to invoke them, does this not deny the possibility of the legal certainty and the predictability of outcome required by the instrumental version of Rule of Law?

My position, and that of others including Radin, is that the Rule of Law survives notwithstanding. As Radin points out, a Wittgensteinian construction does not insist upon extreme rule scepticism because words will always have a relatively stable "core of certain application"[117]--social practice will tend to produce a relationship between a word and its application.[118] It does insist, however, that judges are seen less as functionaries[119] and more as

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[115] Ibid.

[116] Ibid at 810.

[117] Ibid at 802.

[118] Ibid at 798-801.

[119] It should be noted that Radin, ibid, and not particularly well, criticizes Michael Moore for his attempt to combine a traditional Rule of Law with an abandonment of liberal legalism or positivism. She is concerned that he continues to see the judge as a functionary, as being under a "constraint" which demands, in Moore's view, that "judges give up some of the decisional freedom we each have as persons when deciding what, all things considered, it is best to do"(Radin quoting Moore at 811). Radin, at 811, wants to know how Moore's judge can ever be "a responsible moral chooser (a person)" if so constrained yet one then must ask Radin what she means by "responsible" (is not a "responsible" person likewise (continued...)

> an interpretive community conscious of their obligation to act as independent moral choosers for the good of society, in light of what that society is and can become. The law...is neither "found" nor "made," but continuously re-interpreted. There are still rules. But there are not rules that can be understood apart from their context; nor are there rules that can be understood as fixed in time."[120]

Modified instrumentalism requires that one emphasize practise as well as words,[121] that one regard even the application of "procedural" rules as a "pragmatic, normative practice,"[122]--a delimited social activity, not the embodiment of purely objective, purely formalized orderings. It means accepting the consequences of reification: law is never independent of the political and social decisions which produce it.[123] And finally, it means that, notwithstanding the express accommodation of all this necessary contingency, one preserve the Rule of Law "as a central normative commitment of our legal system."[124]

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[119](...continued)
"constrained?") or what she means when she argues, at 819, that the Rule of Law involves seeing the law as a "pragmatic normative practice" (is not a "normative practice" also a "constrained" activity?) While Moore's position has its difficulties--he argues in favour of natural law theory-- Radin has not clearly distinguished her own position regarding the practice of judging from his.

[120] Radin, ibid at 817 (references deleted.) Radin's use of the word "independent" here is unfortunate only because it is unclear--it seems to suggest that judges are not subject to any formalized orderings, however conceived. I believe, however, that the word is intended to convey her position that judges are to conduct themselves as people, not as positivistic automatons.

[121] Ibid at 813.

[122] Ibid at 810.

[123] Blum, supra note 48 at 11.

[124] Ibid at 814.

It needs to be pointed out that Radin's Wittegensteinian perspective on rules also contains its share of obvious assumptions, including the possibility of knowing and applying socially constructed rules. It has the advantage, however, of disengaging itself from formalistic naivety while preserving the idea that the social practice of justice is competent to generate fairness of result and is a worthwhile human endeavour. On this model, then, even a procedural interpretation of the Rule of Law is subject to substantive scrutiny resulting from an acknowledgement of and adjustment to the background values upon which it is based.[125] One thus achieves a more realistic conception of law by focusing on what is necessarily involved in understanding and applying it. Accordingly, modified instrumentalism does not create additional uncertainty or contingency in the idea of the Canadian State--it only seeks not to deny that which is already inescapably present. As Herzog asserts:

> nothing of political note...follows from accepting the claim that forms of life are socially constructed and not mandated by any kind of natural or transcendant necessity. It does not follow, for instance, that radical change may be achieved simply by persuading people of the social construction thesis. Nor does it follow that everything must always be up for grabs.[126]

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[125] For example, the traditional Rule of Law requirement that one must have notice of a rule before one can be regarded as culpable for disregarding it would require reconstruction in light of social practice. For example, Radin argues that a car manufacturer would not be entitled successfully to argue that "it was justified in behaving negligently in light of the old (and decaying) doctrine limiting recovery to those in privity of contract with the manufacturer," ibid at 815, footnote 120, (references deleted.)

[126] Don Herzog, "As Many as Six Impossible Things before Breakfast," (1987) 75 California Law Review 609 at 622-623. Blum agrees with Herzog, supra note 48 at 72-73 and Radin makes a very similar observation, ibid at 803.

Blum makes the same kind of point when he defends the Rule of Law from charges of perniciousness by members of the Critical Legal Studies Movement who argue that it cannot meet the standards of legal formalism. Blum replies:

> the failure to satisfy extreme formalist criteria of objectivity and separation from politics do [sic] not negate the existence of doctrinal regularities differentiating law from purely ad hoc politics.[127]

In Canada, the Rule of Law is constitutionally enshrined,[128] and its importance has been underscored by the Supreme Court of Canada. In Re: Language Right Under Manitoba Act, for example, the court affirms that the Rule of Law is "supreme over officials of government as well as private individuals"[129] and so seeks to preclude the influence of arbitrary power.[130] The court also expressly endorses the instrumental model offered by Raz,[131] and reaffirms the following definition:

> "The "rule of law" is a highly textured expression...conveying...a sense of orderliness, or subjection to known legal rules and of executive accountability to legal authority."[132]

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[127] Blum, ibid at 71.

[128] The Canadian Charter of Rights and Freedoms (the "Charter") asserts that Canada is founded upon the rule of law. See Preamble, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c. 11.

[129] See Re: Language Rights under Manitoba Act, 1870, supra note 58 at 22.

[130] Ibid.

[131] The Court quotes with approval, ibid at 23, the following passage from Raz:

> "'The rule of law' means literally what it says: the rule of law....It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it."

[132] Ibid.

It is thus an important feature of the Canadian State that Government is partially contained by its self-limiting act of placing itself under the Rule of Law.[133]

As constructed in this Chapter, the Rule of Law seeks to formalize the relationship between the individual and State. Like the idea of the State articulated by Dyson, it seeks to "systematize the relationship between individual and State,"[134] by rendering it as predictable as is possible but within the context of social practice. Hence, like the idea of the State, the Rule of Law emphasises the "autonomous exercise of public authority under law rather than participation or citizen competence,"[135] "carries few implications about the form of polity"[136] yet locates State conduct in an ideological context.[137] It regards the State as dependent on the "political choices that produced it"[138] while simultaneously obligating the State to seek relatively formalized orderings between it and the individual.

Identifying the Rule of Law as being in part constitutive of the Canadian State leads to a clearer understanding of that concept by revealing the relative formal stability staked out by the Rule of Law, on the one hand, and the dynamism produced in the State idea by the realities of social practise and the influence of liberal democratic values, on the other. I propose to turn now to the contribution of democratic liberalism to the idea of the Canadian State.

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[133] Dyson, supra note 3 at 15. Dyson asserts that

> the idea of the state as a juristic person ...[implies] the subordination of the state to the law which it created. In this process of auto-limitation, the state ...[retains] its inherent power of will; in submitting to the rule of law it...[limits] itself.

[134] Dyson, ibid at 40.

[135] Ibid at 270.

[136] Ibid.

[137] Dyson discusses ideology inherent in the state idea, ibid at 252-255.

[138] Blum, supra note 48 at 116.

First, however, it needs saying that democratic liberalism is not all one theory or idea. It too is a multifaceted, contested concept which generates debate between its fundamental and reform based proponents on matters as basic as whether the traditional liberal model of the rational, self-maximizing, possessive individual is an impoverished[139] or a solidly realistic account of human nature. To this extent, liberal theory does the very thing it seeks to describe[140] by manifesting a tolerance for diversity and in tacitly assuming that the best account will carry the day.[141] This also means, however, that the conceptual dynamism inherent in liberal theory poses problems both of simple description and substantive resolution.

Nonetheless, it is possible to identify relatively stable, core liberal values[142] while acknowledging that they cannot be incontestable. And though the project of identification is thereby necessarily limited and consciously constricted for the purposes of this Chapter, it produces enough to assist in directing debate regarding important aspects of the Canadian State.

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[139] C.B. Macpherson, The Real World of Democracy (Toronto: The Hunter Rose Company, 1965) contends, at 54-55, that the model is profoundly impoverished; authors referred to by Dyson and Gray in footnote 38 take the opposite position.

[140] Macedo, supra note 75, notes that "liberal institutions provide the settings for ongoing efforts to formalize, clarify, contest, justify, refine, and extend liberal principles," at 40.

[141] Gray, supra note 38, remarks upon the distinctive meliorist trend characterizing liberalism, at x.

[142] Gray, ibid at ix, asserts that "whereas liberalism has no single, unchanging nature or essence, it has a set of distinctive features which exhibits its modernity."

Liberalism is first and foremost about regard for the human person, about an overarching respect for the "autonomy of the individual."[143] It stands for "peace through toleration, law-bound liberty and a rights-orientated conception of justice."[144] Respect for individual autonomy means that, for the most part, the individual occupies a qualified position of primacy over the collective;[145] this in turn creates a polity necessarily "characterized by many competing conceptions of the good life."[146] Liberalism is egalitarian,[147] holding that all members of society are of equal moral worth.[148] It acknowledges the serious threats to individual autonomy posed by State authority[149] and in the potential for an intolerant use of power by the political majority.[150] Accordingly, it seeks to mitigate social and political relationships because it assumes that "individual rights have a substance worth preserving."[151] It seeks to safeguard liberty[152] through enforcing an evolving, mutable[153] list of freedoms, including freedom of speech, expression, movement and association as well as freedom from arbitrary arrest or detention.[154] It identifies the need for checks and balances on government and political majorities to avoid abuses of power;[155] it affirms the principle of governmental accountability,[156] as well as the constructive possibilities of human rationality.[157] Liberals trust in the corrective power and justice producing capacity of procedure generally and the Rule of Law specifically;[158] they affirm the possibility of and value in principled "strategies of governance."[159] I will postpone a discussion of the positive values associated with liberalism.

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[143] Macedo, supra note 75 at 87.

[144] Ibid at 40.

[145] Gray, supra note 38 at x; Blum, supra note 72 at 120; and Macedo, ibid at 284.

[146] Macedo, ibid at 75. There are, of course, limits to what liberals would accept as the legitimate pursuit of the good life. See, for example, Rawls, supra note 68, where he presents two overriding principles through which individual liberty is constrained, at 60-65.

[147] Gray, supra note 38 at x.

[148] Ibid.

[149] Cairns, supra note 16 at 320, asserts that the Canadian State is "not a distant Olympian presence, but an omnipresent factor" and at 320 approvingly refers to Douglas Hartles' assertion in Public Policy and Decision Making and Regulation (Toronto: Butterworths, 1979) that the state has a vital role

> as the ultimate rule maker and rule enforcer that can and does, by changing the rules, affect all of the sources of well-being of all individuals directly or indirectly, for good or for ill.

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[150] See Ronald Dworkin, "Liberal Community" (1989) 77 California Law Review 480 at 481.

[151] Blum, supra note 48 at 71.

[152] Gray, supra note 38 at 46.

[153] As Gray notes, ibid at 61, liberal freedoms are not fixed: they "will embody the conditions necessary in a given historical circumstance for the growth and exercise of powers of autonomous thought and action."

[154] Gray, ibid. These individual rights and freedoms are constitutionally enshrined on the Charter, supra note 128.

[155] As Gray notes, ibid at 74, a liberal political order requires "constraints on the arbitrary exercise of governmental authority" and insulates basic liberties from "revision by temporary political majorities." See to Blum, supra note 48 at 77 and Macedo, supra note 75 at 2.

It is clearly at this point that the Rule of Law regard for procedural integrity becomes both an informing structure and a value. Good procedure is seen as integral, but not sufficient to justice and fairness.

[156] Blum, ibid.

[157] Blum, ibid at 76, argues that under liberalism, the governmental has a fundamental obligation "to act rationally and to promote the general welfare."

The forgoing is offered as an attenuated account of the negative values which constitute a dominant feature of liberal theory.

It is because of its negative content that liberalism has often been regarded as having no developed understanding of the public interest: as being incapable of fostering a consensual community[160] or of providing a public morality.[161] Accordingly, the liberal societies of Britain and the United States, for example, are also seen to embody only a weak notion of the State (when compared to their Western continental European counterparts) because Anglo-American liberalism is regarded as having stripped away the political tools and social resolve to produce a structured notion of the public interest. In short, it is assumed that liberalism is so focused on the private, that it cannot properly acknowledge, let alone generate insight into, the public. Dyson, for example, offers numerous and distinct reasons for his assessment of Anglo-American societies as "stateless," (that is, he recognizes parallels and differences between the British and American traditions both of which lead away from a full understanding of the State) none of which directly refers to the impact of liberalism but many of which unmistakably assume its influence. Take, for instance, his assertions that England has manifested "in particular a disinclination to explore ideas about the distinctive character of public authority,"[162] that Anglo-American governments are not ascribed with any strong "capacity to determine what the public interest is,"[163] that there is no conceptualization of the public interest as pre-existing but rather as something which emerges as the "compromise product" of bargaining amongst competing groups.[164] All this is to argue subtextually that a primary regard for the individual, doubtless a feature of Anglo-American societies, forecloses the existence of a strong community and sense of the public interest and well-being. Accordingly, for Dyson, Anglo-American societies have neglected a Western continental European notion of the public interest, that is a notion which unifies, and is

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[158] See Macedo, supra note 75 at 10 and 272.

[159] Blum, supra note 48 at 77.

[160] Macedo, supra note 75 at 78

[161] Ibid.

> common to all members of society, a collective self-interest subject to reinterpretation by which individuals will prefer not to pursue their "egoistic" interests in order that others will not inflict damage on them by pursuing theirs.[165]

Instead, English-influenced societies tend to translate political morality into the practise of civility which "involves mutual respect for individuality and, therefore, tolerance of diversity."[166] All this implies exhibiting a reliance not on some relatively fixed State idea but on the

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[162] Dyson, supra note 3 at 42.

[163] Ibid at 272.

[164] Ibid at 274.

[165] Ibid.

[166] Ibid at 201.

> creative nature, vitality and resilience of a variegated civil society and in civic humanism, rooted in the practise of civility, as the source of standards in public life.[167]

If Dyson's assessment of the Anglo-American State is correct, then two things follow. First, it means that Canada, as a beneficiary of British traditions and so a participant in a similar kind of liberalism, has a very rudimentary idea of community and thereby partakes in a highly contingent existence. Second, it means that the Canadian idea of the State is emphatically uni-directional; it specifies what the Government cannot do but provides no guidance as to what it can or ought to do. Accordingly, the positive content in the Canadian idea of the State is thin, mercurial, and elusive. And because it is very difficult to theorize about, it therefore can provide only limited assistance in defining the nature of the Canadian State.

Fortunately for this project, however, Dyson's assessment is incorrect. Like other critics of liberalism, he falters in his analysis simply because he is not "taking liberalism seriously"[168] and in this case, on three closely related fronts. First, he fails to see how aspects of the State idea could legitimately and usefully be founded on specifically negative values related to protecting individual autonomy and the concomitant ethic which casts the provision of this protection as a worthwhile State endeavour.[169] Second, he fails to recognize that even the most "rights" orientated version of liberalism has embedded in it a notion of community and so of what constitutes pivotal components in the public interest.[170] Third, he implicitly assumes that Anglo-American liberalism is incompetent to generate principled "strategies of governance"[171] because, for him, liberalism resolves all conflicts by compromise only--there are few fixed ideas which limit how conflict is to be resolved. As I have already made note of the ethical and procedural principles concomitant with a liberal respect for the individual autonomy, I will now explore the notions of community and the strategies of governance which are implicit in liberalism. In this way, I hope to uncover further content to the idea of the Canadian State, content which is positive and generative.

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[167] Ibid.

[168] Blum, supra note 48 at 75, uses this phrase. Blum also asserts that "Currently in the United States, we are experiencing a kind of political confusion and backlash against liberalism," at 68. Macedo, supra note 75 at 4, notices this trend as well: "'liberal' has become a term of abuse in the American political lexicon."

[169] This also accounts for Dyson's tendency to minimize the threat which a continental Western European idea of the State poses to democracy.

Majority rule is not another word for democratic liberalism. Neither is it another word for community. Indeed, Dworkin cogently argues that liberalism embraces a notion of community as constituted by formal political decisions made by officials who "act self-consciously under a constitutional structure that transforms their individual behaviour into national decisions."[172] This notion of community is grounded in an abiding affirmation of justice and on the notion that the individual has an integrative stake in the salubrity of even the most thinly construed political community.[173] Hence, while there may be disagreement amongst community members as to what justice is, there is a shared understanding

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[170] Dworkin, supra note 150 at 480.

[171] I have borrowed this phrase from Blum, supra note 48 at 120.

[172] Dworkin, supra note 150 at 496.

[173] Ibid at 499.

> that politics is a joint venture in a particularly strong sense: that everyone, of every conviction and economic level, has a personal stake--a strong personal stake for someone with a life sense of his [sic] critical interests--in justice not only for himself but for everyone else as well. That understanding provides a powerful bond underlying even the most heated argument over particular policies and principles.[174]

For Dworkin, an unjust community impedes the critical interests of the individual in pursuing his or her life project; accordingly, each of us "shares that powerful reason for wanting our community to be a just one."[175] Further, the liberal public ideal to favour policies which respect the equality of each citizen[176] is not realized in a community which disregards justice. Thus, concludes Dworkin,

> our success or failure in leading the lives people like us should have, are in that limited but powerful way parasitic on our success together in politics. Political community has that ethical primacy over our individual lives.[177]

This foundational integration between justice and liberalism has been asserted by other modern theorists as well, including d'Entreves,[178] John Rawls,[179] and Macedo.[180] It is a core liberal political value which has strong public repercussions including the provision of social stability and the aspiration that conflict can be peacefully resolved on the basis of principled rationality. It also provides specific content to the idea of the Canadian State in that it requires a normative concern with determining the proper conditions for the exercise of State power. For the specific matter of what Government can and cannot do, of what would be just governmental conduct, the idea of the Canadian State means that it is held to standards of behaviour which, while never capable of a definitive articulation, can be identified. Blum convincingly argues, for example, that liberal values limit the range of options open to the State[181]--he thereby places the matter of governmental conduct squarely in the normative realm. And so, among other matters, Government is bound by an ethic which enforces respect for individual autonomy; Government is bound by the Rule of Law and so is forbidden to conduct itself arbitrarily; Government is responsible for the presence of justice in the community; Government is bound by its democratic mandate to serve the electorate. Put another way, normative constructs embedded in the notion of justice and negative liberal values are the ideas which constrain Government and foster a consensual community. And all this can and does occur in the midst of liberal democratic pluralism because "liberal justice overarches the diversity of liberal society informing its constitution and provides a public morality."[182]

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[174] Ibid at 501-502.

[175] Ibid at 504.

[176] Ibid at 503.

[177] Ibid at 504.

[178] D'entreves, supra note 2, asserts that State power is doubly qualified. It is qualified by "law and by values inherent in the state and expressed in law, namely justice," at 3-4.

[179] Supra note 68.

[180] Supra note 75. Macedo uses a slightly different vocabulary to discuss justice, devoting much of his book to what he calls "public justification." Public justification requires that "the application of power [by the State] should be accompanied with reasons that all reasonable people should be able to accept," at 41.

The notion of justice, of bounded choices emanating from democratic liberalism, does not, of course, create an uncontestable and enumerative understanding of the public interest nor of the consensual community embodied in democratic liberal societies of the Canadian State itself. This is because first, both theory and practise deny such a possibility[183] and second, the flexibility mandatorily produced by a liberal ethic of tolerance quite rightly forecloses the possibility of definitive autocratic pronouncements regarding it. But at the same time, the idea of the Canadian State is not rudderless. We have seen that it requires both the modification of and constraint upon political choices open to Government which are derived from respect for negative liberal values.[184] And, in addition, when one ascribes to the State, as many liberals do[185] an active, social welfare role through which it is made responsible for public good[186] and so is required to have a community presence and social commitment "going beyond rights-protection and the upholding of justice,"[187] further content is lent to the Canadian idea of the State. Taken together, the State's performative and reactive functions, as well as the auto-limiting act binding it to the Rule of Law, each identify and create standards of conduct which the Government must meet in its activities. And these standards are never merely private ones.[188] Indeed, standards governing the governor are derived from and necessarily elevated by the State's solemn obligation to protect individual rights, promote the common good, provide collective goods and social welfare benefits, respect the Rule of Law, and ensure the presence of justice in the community. The standards of conduct concomitant with such powers and responsibilities are distinct and mandatory. Concerning at least this, Canada has a public morality, a consensual community, a State concept.

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[181] Blum, supra note 48 at 135-138.

[182] Macedo, supra note 75 at 78.

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[183] Indeed, even the elevated sort of public interest manifest in the Western continental European State cannot be clearly identified because, as Dyson points out, supra note 3 at 8, the notion of the State is unavoidably imprecise:

> As a philosophical and culturally rich concept, state is not amenable to the elaboration of 'operation indicators' involved in the sort of rigorous definition desired by advocates of the natural science paradigm and system builders.

See too my earlier discussion on meta-theory, supra at 11-14 of this Chapter.

[184] In fact, the Charter renders mandatory this constraint on Governmental power subject to section 1 ("justifiable limits") and section 33 (non obstante).

As the Report on Independent Administrative Agencies: A Framework for Decision Making (Ottawa: Law Reform Commission of Canada, 1985) at 12 asserts, the Charter underscores the "importance of procedure in any governmental decision making process and invites the expression of its values."

[185] Most liberals would agree that a minimal level of government is mandated by liberal democratic tenets. Note that Gray, supra note 38 at 73, holds this view:

> Classical liberals such as Humboldt, Spencer and Nozick have argued, it is true, that the functions of the state must of necessity be restricted to the protection of rights and the upholding of justice, but this position has no clear warrant in liberals principles and is a minority view within the liberal tradition.

IV. CONCLUSION

The discussion in this Chapter has illustrated that accounting for the Canadian State is an elusive project because the State is not contained in its constitutive components--it is necessarily located outside of the ideas and conduct which produce it. The State concept is found in the fluctuating convergence and tension between theory and practice, in its foundational ideas which are both fixed and contingent, and in the conduct of public officials and elected representatives which is both principled and not, both considered and not. The State concept is constantly transcending the words used to describe it.

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[186] Blum, supra note 48 at 76. As the Law Reform Commission of Canada has noted, supra note 12 at 52:

> The State has ceased to be simply the provider and guarantor of a liberal order: it is also responsible for performing a host of services which have considerably altered the nature of its functions....Academic opinion is unanimous in noting the transition from a "Watchdog State" to a "Welfare State."

[187] Ibid at 73-74.

[188] See Cohen, supra note 12 at 381.

But notwithstanding its protean qualities, I have spoken about the Canadian State in the belief that it will get us somewhere. While the State is, as Dyson so astutely asserts, a problem creating concept,[189] it is also a problem solving concept[190]--among other matters, it contextualizes the exercise of public power and suggests limits on what officials can do in the name of the polis and how they can do it,[191] it enforces a relationship between "idea and conduct," between "form and practise in public life."[192] While the moral and political ideas in the Canadian State concept are partially created by institutional conduct, the claim can be made that these moral and political ideas simultaneously exist "apart from the conflicts and fluctuations of social and political life;"[193] accordingly, they enforce a critical distance between the contingency of liberal ideas and competing notions of the good life, on the one hand, and the core liberal values which are capable of a relatively lasting articulation, on the other. On this basis, and while necessarily eschewing extreme positivism, we can usefully speak about evaluating governmental conduct against interpretative, normative standards generated by the concept of the Canadian State; this, in turn, has generative capabilities by implying the possibility of a yet more refined understanding of the Canadian State--and so the further refinement of those standards.

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[189] Dyson, supra note 3 at 254 and 270.

[190] Ibid.

[191] Ibid at 275.

[192] Ibid at 6.

[193] Ibid at 232.

CHAPTER TWO: THE PRIVATE LAW MODEL OF STATE LIABILITY

INTRODUCTION

In the last Chapter, I sought to identify some of the ideas which comprise the notion of the Canadian State. These include an express valuing of liberal democratic principles, including an instrumental model of the Rule of Law. I emphasized the foundational integration between justice and liberalism, arguing that, on this basis alone, the idea of the Canadian State has a normative concern with determining the proper exercise of State power. I also made the claim that liberal democratic values assist in defining the content of the relationship between individual and State by identifying the State's duties and obligations when interacting with its citizenry. The State is always held to a standard of conduct which calls on it, among other things, to respect its relationship with the individual, preserve the rights and autonomy of each person, act in the interests of the public good, provide accountable government, and ensure the presence of justice in the community.

The law governing the State contract does not deny the importance of liberal democratic principles in Canadian society but nor does it require that they be addressed in determining how a dispute ought to be resolved. Rather, the State contract is characterized in terms of the private law: it is agreed that--subject to legislation and prerogative powers--the Government has a common law power to contract,[1] is bound as if it were an individual,[2] has a "duty to abide by and obey the law"[3] in all its parts, and enjoys no common law immunity from liability for breach.[4] As Lord Watson asserts in Windsor and Annapolis Rwy. Co. v. The Queen:

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[1] Attorney General of Quebec v. Labrecque [1980] 2 S.C.R. 1057 at 1082.

[2] Bank of Montreal v. Attorney General for Quebec [1979] S.C.R. 565 at 573-574.

> It must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown.[5]

Absent statutory restrictions to the contrary, even ordinary rules of agency apply,[6] meaning that the Government can be contractually bound through the actual or ostensible agency of its Ministers[7] or its public officers.[8] The Government is taken to be just like--or just about like--anyone else.

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[3] Per Sir George Farwell in The Eastern Trust Company v. McKenzie, Mann & Co. [1915] A.C. 750 at 759 (J.C., on appeal from the S.C.C.). The duty to abide by the law is placed on "the Crown and every branch of the Executive" at 759.

[4] See Thomas v. The Queen (1874) L.R. 10 Q.B. 31 which provides that a petition of right for unliquidated damages lies against the Crown for breach of contract; referred to with approval in The Queen v. Murray [1965] 2 Ex.C.R. 663 at 668-669, affirmed (1967) 60 D.L.R.(2d) 647 (S.C.C.).

[5] (1886) 11 A.C. 607 at 613 (P.C.), quoted with approval by the Supreme Court of Canada in Bank of Montreal, supra note 2 at 573.

[6] Verreault v. Attorney General for Quebec (1977) 1 S.C.R 41 at 46-47 (S.C.C.); The Queen v. CAE Industries Ltd. (1985) 20 D.L.R. (4th) 347 at 373-374 (F.C.A.), leave to appeal to the S.C.C refused (1985) 20 D.L.R. (4th) 347n.

The prime motive behind this private law strategy is to combine the liberal ideal of maximizing liberty with the objective of attaining a fair outcome in legal contests between individuals and the State.[9] It thereby conforms, notes one Canadian commentator, "to a widely held political ideal"[10] reaching back at least as far as Dicey.[11] Indeed, by preserving the private law value of freedom of contract,[12] even in the face of relationships involving the State, the legal regime seeks to facilitate individual liberty. By insisting that the State is subject to the same contractual rules which constrain the individual, it intends to preserve fairness.[13] The common law protects individual autonomy by declining to recognize the State's status as governor when it is in the contractual arena.

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[7] Attorney General of Canada v. Newfield Seed Ltd. (1989) 63 D.L.R. (4th) 644 at 660 (Sask. C.A.) and The Queen v. Transworld Shipping Ltd. (1975) 61 D.L.R. (3rd) 304 at 307 (Fed. C.A.).

[8] The Queen v. Transworld Shipping Ltd., ibid at 308, referring with approval to Carltona Ltd. v. Commissioners of Works [1943] 2 All E.R. (C.A.) 560 at 563. A public officer is one whose fills a statutory office, per Sumner v. Chandler [1878] 18 N.B.R. 175 at 185 (N.B.C.A.), or one who is appointed to discharge a public duty and is paid by the Crown to do so, per Smith v. Christie [1920] 3 W.W.R. 585 at 591-592 (Alta. S.C.A.D). As the court in Carltona at 308 points out, no Minister could personally attend to all his or her administrative responsibilities and so

> duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the minister by responsible officials of the departments. Public business could not be carried on it that were not the case.

[9] See Hugh Collins, The Law of Contract (London: Weidenfeld and Nicholson, 1986) at 1 where identifies the "latent social ideal" of contract law to be the maximization of individual liberty.

[10] Peter Hogg, Liability of the Crown (2nd ed.) (Toronto: Carswell, 1989) at 2.

[11] See my discussion of Dicey, supra Chapter One at 23.

[12] As Collins asserts, supra note 9 at 1, the conventional perspective on contract law says that it creates "a facility for individuals to pursue their voluntary choices."

This private law strategy, while consistent with liberal democratic objectives and the Rule of Law set out by Dicey, is nonetheless problematic. There are two important objections. The first relates to the premise behind the strategy: it assumes that the State has a private analogue[14] and so can be compared to an ordinary individual or corporation. The second relates to the proposition that the private law model accounts for the current state of the law, that the State is truly bound as if it were an ordinary citizen. Indeed, by ignoring the identity of the State when it is in the contractual arena, the model disregards the State's coercive resources and liberal democratic obligations. This reductionism heightens individual vulnerability by denying its existence--an ironic and counterproductive result.

In the following Chapter, I propose to test these objections against the private law model. The first section will set out the private law model of contract. It will also assess the premise behind applying this model to the State contract, namely, that the State has a workable private analogue. The second section will evaluate the ability of the private law model to account for the law governing the State contract as well as analyze its compatibility with liberal democratic theory. The third section will consider the model's success in protecting the individual's interests represented in the State contract.

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[13] As Dicey comments, the Rule of Law includes the idea that every person, of whatever "rank" or "condition" is subject to the ordinary law of the realm." See Introduction to the Study of the Law of the Constitution (7th ed.) (London: MacMillan and Co. Ltd., 1908) at 189. Dicey's first edition was published in 1885.

[14] I have borrowed this phrase from David Cohen, "Thinking about the State: Law Reform and the Crown in Canada" (1987) 24 Osgoode Hall Law Journal 379 at 381.

My object is to demonstrate that the private law model of State liability is contrary to the idea of the Canadian State because it generates legal uncertainty, fails formally to accommodate the State's duties of governance, and makes the individual needlessly vulnerable to State power. This demonstration is preliminary to proposing--in Chapter Three--an alternate theory of liability which would expressly acknowledge the unique qualities of the State contract, seek to generate public law principles which accommodate the State's public obligations, contain its power, and manifest due regard for values elevated by liberal democratic theory.[15]

I. THE PRIVATE LAW MODEL OF CONTRACT

Treitel provides the following definition of a contract: "A contract is an agreement giving rise to obligations which are enforced or recognized by law."[16] An agreement, in turn, implies at least three elements which are particularly germane to an analysis of the State contract. First, it implies freedom of contract--that parties are empowered to strike any bargain they please. This is a tempered freedom of contract, however, as modern contract theory rejects the classicists' world of "totally autonomous individuals, free to transact on any terms... and thereby to control their own destinies."[17] Instead, it selects the image of "relatively autonomous individuals transacting in an environment regulated by trade custom and state intervention that alleviates the most extreme hardships of the market."[18] It is within this latter context[19] that freedom of contract remains a private law value. Second, an agreement implies some measure of equality in bargaining power between the parties so as to define the line between true consent and "a state of mind which cannot properly be described as consent at all."[20] Third, it requires both finality and closure as contractual obligations are concluded at a single point in time: "generally speaking, an agreement is made when one party accepts an offer made by the other."[21] It is at this moment that the deal is set, the terms defined; it is from this vantage point that one assesses mutual obligations and so what constitutes breach.

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[15] Accord Cohen who asserts that "private law doctrine is an inadequate tool to resolve individual-state conflict," ibid. A public law strategy is also favoured by the Law Reform Commission of Canada in The Legal Status of the Federal Administration (Working Paper No. 40) (Ottawa: Law Reform Commission of Canada, 1985) when it calls for administrative law with a "distinctive meaning," at 26-28, and one which would recognize the differences between individual and State, at 59-60. Current law reform, notes the Commission, must have due regard for the "paramountcy of liberal concepts" at 42.

[16] The Law of Contract (7th ed.) (London: Stevens & Sons, 1987) at 1.

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[17] Jay Feinman, "The Significance of Contract Law Theory" [1990] 58 Cincinnati Law Review 1283 at 1309-1310.

[18] Ibid at 1310. Treitel points out that there are now statutory regimes which regulate the terms and conditions of many important contractual relationships, supra note 16 at 2-5, and this reduces classically conceived freedom of contract. See too P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979).

Note that Feinman rejects both the classical and modern theories of contract because, among other matters, they do not recognize their own ideological perspectives, at 1309-1310.

[19] Feinman, ibid at 1286.

[20] Treitel, supra note 16 at 3.

[21] Ibid at 7.

Events, words, and obligations originating before or after this critical moment are, as a general proposition, of no legal consequence.

To apply these three elements to the State contract, one must first establish that the State has a workable private analogue--that the State properly can be likened to a private individual or corporation. This requires evidence that the courts consistently treat the State contract as if it were a private agreement and further, that such treatment is consistent with liberal democratic theory. Compatibility with theory is important because a model of State liability ought not to conflict with the idea of the Canadian State.[22] Also required is evidence that the State contract can be competently analyzed in terms of the private law ingredients outlined above. Finally, there must be evidence that State defences to liability are comparable to those available to the ordinary individual.

1. The Analogical Premise

a. The liberal democratic perspective

In this section, I will introduce two elements derived from political theory which render the State fundamentally different from the individual, even within a contractual relationship, namely its coercive resources and duties of governance.

i. The State's coercive resources

The fact of State power persists even in a liberal democratic society which elevates the Rule of Law. Put briefly, the principle of Parliamentary sovereignty means that the State is never truly subject to law[23] and so is fundamentally unlike the individual. State power means that the State has coercive resources from which the individual requires protection.[24] It means that the State is "a monopolist of legitimate force."[25] In short, within the context of a liberal democracy, the State embraces

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[22] See my discussion of the idea of the Canadian State, supra Chapter One at 23-52.

> a double system of power. It is a system by which people can be governed, that is, made to do things they would not otherwise do, and made to refrain from doing things they otherwise might do. Democracy as a system of government is, then, a system by which power is exerted by the state over individuals and groups within it.[26]

Still, it does remain rare for the State to force the individual into a contractual relationship. On this basis, therefore, one could argue that the fact of State power remains largely irrelevant in the market-place. Yet it must be remembered that when the State and individual agree to certain contractual provisions, the commitment each gives is essentially different. This is because the State retains its identity even when submitting to the private law and is never stripped of its extraordinary resources. Rather, in entering the market, it elects ~~in~~ a non-binding way to place those resources in abeyance; it has a legal alter-ego to which it can revert. The individual, by way of contrast, is fully and finally bound.

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[23] Tony Prosser, "Towards a Critical Public Law" (1982) 9 Journal of Law and Society 1 at 7.

[24] Mr. Justice Sopinka notes that the role of the Charter is to protect the individual "against the coercive power of the state." See McKinney v. University of Guelph (December 6, 1990), (S.C.C.)[unreported] at 54-55.

[25] Quentin Skinner, "The State" in Terence Ball and James Farr (eds.) Political Innovation and Conceptual Change (Cambridge: Cambridge University Press) at 107.

[26] C.B. Macpherson, The Real World of Democracy (Toronto: Canadian Broadcasting Corporation, 1965) at 4. See too discussion by the Law Reform Commission of Canada, supra note 15 at 61-65.

ii. The State's duties of governance

Chapter One has already identified the critical relationship between justice and liberalism[27] in the idea of the Canadian State and claimed that liberal values necessarily restrict and define what constitutes acceptable governmental conduct. Because it is the State's job to ensure the presence of justice in the community, to respect its role as law-maker,[28] to guarantee a liberal order,[29] as well as to exercise its powers in the interests of the common good, the State must always have due regard for the quality of its actions, even in the market-place. For, without integrity and consistency of State conduct, an intolerable contradiction would emerge between "idea and conduct," between "form and practice in public life."[30]

Because its duties of governance are both mandatory and general, the State is required to respect its relationship with the individual and society at large even when a named individual and the State interact in other ways--including contractual ones. Neither the antecedent individual-State relationship nor the State-society relationship disappear in light of a contract because liberal democratic theory says they cannot.[31] On the contrary, these relationships persist and influence the State's newly assumed obligations.

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[27] See supra Chapter One at 46-51.

[28] See Northern Territory of Australia v. Skywest Pty. (1987) 48 N.T.R. 20 at 46.

[29] Law Reform Commission of Canada, supra note 15 at 52.

[30] Kenneth Dyson, The State Tradition in Western Europe: A Study of an Idea and an Institution (Oxford: Martin Robertson, 1980) at 6.

This means that, like any other public body, the State "possesses powers solely in order that it may use them for the public good."[32] It means that the State has nothing to win or lose by entering into a contract because

> it represents, not its own interests (indeed, it is difficult to envisage how the administration, as such, can have any interests of its own), but the interests of the public, of society in general.[33]

The State's obligations are not contained in the contract alone because it continues to have duties of governance and the private party continues to be an individual citizen. The State is obliged to fulfil simultaneously its duties in extra-contractual relationships as well: it must strive to conduct itself with integrity, fairness, and consistency. Liberal democratic theory limits what the State can do in the market-place, how it can do it, and for what reasons.

The individual's contractual behaviour, on the other hand, is not similarly constrained. It is a hallmark of democratic liberalism to minimize formal demands on the individual because he or she occupies a qualified position of primacy over the collective[34] and because liberalism contemplates a wide range of acceptable social interaction. As Hugh Collins summarizes it:

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[31] The Court in Skywest acknowledges that even in a contractual setting, the State remains a lawmaker. See supra note 28 at 46.

[32] Wade, Administrative Law (6th ed.) (Oxford: Clarendon Press, 1988) at 400.

[33] Allan Mewett, "The Theory of Government Contracts" (1959) 5 McGill Law Journal 222 at 223, in reference to public contracts.

[34] John Gray, Concepts in Social Thought: Liberalism (Minneapolis: University of Minneapolis Press, 1986) at x.

> A...conventional classification of the law of contract, which has dominated legal discourse during the last century, views the purpose of contract law as the creation of a facility for individuals to pursue their voluntary choices. Its latent social ideal embodies a liberal state in which the law maximizes the liberty of individual citizens, encourages self-reliance, and adopts a more or less neutral stance with regard to permissible patterns of social life. It secures these goals by facilitating the creation of legal obligations on any terms which individuals freely choose. This familiar textbook picture unites the law of contract by deriving its principal doctrines from the concept of voluntary choice.[35]

Notwithstanding the clear differences between individual and State, the State's ongoing liberal democratic obligations in the contractual arena are often forgotten. First, because the private law model does not generally give legal significance to extra-contractual relationships, State obligations are referenced only with respect to the contract in question. Second--absent bad faith on the part of a State official[36]--the State's duty to act in the public good and treat the individual with respect is largely unenforceable. In sum, because it is not clear when the State's contractual conduct will be subject to judicial review,[37] and even whether it is bound by fiduciary principles,[38] the larger social and political context of the State contract is ignored.

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[35] Supra note 9 at 1. There are, of course, common law principles which ameliorate some of the harshness which can come from this model. Further, its descriptive accuracy has been challenged by scholars such as Collins, supra note 9, and Ian Macneil. See, in particular, Macneil's The New Social Contract: An Enquiry into Modern Contractual Relations (New Haven: Yale University Press, 1980). Nonetheless, the liberal ideal of voluntary choice remains at the centre of neo-classical contract law.

[36] According to Sue Arrowsmith, Government Procurement and Judicial Review (Toronto: Carswell, 1988) at 182, State officials must act within the doctrine of good faith and so are "prohibited from acting out of personal motives." The official must also respect the rule against self-dealing--it must not deal in its official capacity with itself in its personal capacity, at 186. If either the doctrine or the rule are disregarded, the contract is voidable at the instance of the Government, at 186.

[37] As I will discuss in the third heading of this section, infra at ..., there are cases which subject aspects of the State's contractual conduct to judicial review but its (continued...)

The fact that many of the State's liberal democratic duties are legally unenforceable or of uncertain legal stature does not make them less solemn or politically mandatory. Nor does it mean that the State and individual are largely equivalent when in the market-place. The private law model largely disregards individual-State differences only because it does not have the categories to contemplate them in the first place. Its premise that the State and individual are analogous cannot produce a liberal democratic pedigree.

b. The Common Law Perspective

Though it is said that the State is contractually bound as if it were an individual,[39] a review of British and Canadian case law, dating back to the eighteenth century, reveals judicial recognition that the State differs from the individual in basic, unbridgeable ways. While it must be emphasized that this case

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[37](...continued)
scope has not yet been defined. I will argue in Chapter Three that the State ought to owe a duty of fairness in all its contractual dealings.

[38] See Arrowsmith's discussion, supra note 36 at 189-190. In Arrowsmith's view, there should be a public law of fiduciary obligations, at 189-190, because it would impose a greater range of substantive obligations and remedies. For example, where a public contract is awarded on the basis of a bribe, it constitutes "a breach of the public law doctrine of good faith" and so can be set aside. But, according to Arrowsmith at 184, the

> fiduciary obligation...goes further--it forbids a party from accepting a bribe, not merely from acting on it. Thus, a party relying on this doctrine need not show that any award was induced by the bribe, but only that the bribe was made.

[39] See Bank of Montreal, supra note 2.

law does not constitute a large body, it is nonetheless important for identifying legally significant differences between the State and the individual and this even in a commercial setting.

As early as 1786, in the decision of Macbeath v. Haldimand,[40] Lord Mansfield stated that when a Crown servant enters into a contract, there is, as a general proposition, no personal liability: "We cannot argue from the nature of private agreements....The presumption is that the public faith, or justice of the Crown is always relied upon."[41] A nineteenth-century textbook writer, quoted with approval in the 1878 decision of Sumner v. Chandler, also invokes a value-laden presumption regarding the standard of behaviour expected from the State when an agent seeks to contract on its behalf:

> The natural presumption...is that the contract was made upon the credit and responsibility of the government itself as possessing an entire ability to fulfil all its just contracts far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in the spirit of liberal courtesy.[42]

In 1920, a Canadian court even enforced a Government apprenticeship contract which it otherwise would have found to be too obscure, it said, had only individuals been involved.[43] The presence of the Crown as the other contracting party allayed any concern that the apprentice involved would have been made unreasonably vulnerable under the contract. In the court's opinion, "it must be assumed that the Crown, acting by a responsible minister, will deal fairly and justly."[44]

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[40] 1 T.R.181.

[41] Ibid at 185. One finds a parallel pronouncement in the decision of Hopkins v. Mehoffey (1824) 11 Serge & Rawle 126 at 128:

> In general, it is true, that there is a distinction between contracts that are entered into on the part of government, by its agents, and those which are entered into on the part of individuals or corporations, by those who represent them. In respect of the first...the public faith is exclusively relied on, whenever the agent does not speedily render himself liable.

[42] Story on Agency (8th ed.), quoted in Sumner, supra note 8 at 10.

Considerably more recently, the Supreme Court of Canada, in a 1990 decision,[45] emphasized some of the distinctive interests which the State represents in a contractual dispute:

> The Crown represents the state. It constitutes the means by which the federal aspect of our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the federal government.[46]

There is even judicial reflection from an Australian court on the link between government conduct in the contractual arena and the Rule of Law. The court in Northern Territory of Aust. v. Skywest Pty. Ltd. observed:

> A government is not only a party to a contract; through its control of Parliament it is a lawmaker. In that capacity it has an interest in ensuring that people respect and observe the law, and to do so it must display by its actions some minimum respect for its own rules. For it

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[43] Rex v. Novak [1920] 1 W.W.R. 136 at 137 (Man.C.A.).

[44] Ibid. Whether this case continues to be good law is questionable--I cite it only as an example of a judicial attitude.

[45] Rudolph Wolff & Co. v. The Queen (1990) 69 D.L.R. (4th) 392 (S.C.C.).

[46] Ibid at 397.

On the basis that "the Crown cannot be equated with an individual," ibid, the Court upheld the constitutionality of legislation giving the federal courts exclusive jurisdiction on claims against the Crown.

> is in the public interest that when a government contracts with an ordinary person, it deals fairly with that person and is seen to do so.[47]

The court implies that more is expected from the State in a contractual context because more is at risk should it disregard its pre-existing obligation to treat the individual fairly, namely, social respect for the Rule of Law.[48]

Macbeath and other decisions like it,[49] suggest that some of the principles derived from commercial practice are misplaced when the contractual principal is the State. The decisions in Novak and Skywest Pty intimate that the contractual presence of the State calls for a similar modulation--this because the State can be relied upon to be less combative, less obstructive,[50] and more reasonable than the ordinary individual. These courts assume that the Crown has an extra-legal obligation to do the right thing, to "do ample justice to the plaintiff's demand if it be well founded,"[51] and so, indirectly at least, expect no less of it. While their assumptions are never expressly tied back to the idea of the State and the liberal democratic quality of its obligations, the courts do see the State as an entity which can be trusted to be fair and just even if it were entitled to be otherwise by contract or operation of law. Moreover, the courts are willing to enforce the State's solemn obligation to act in the public interest even within the context of a contractual dispute.[52]

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[47] Supra note 28 at 46.

[48] Ibid.

[49] Sumner v. Chandler, supra note 8; Hopkins v. Mehoffey, supra note 41.

[50] For example, according to the Court in Deare v. Attorney General (1835) 1 Y & C 197 at 208:

> It has been the practice which I hope never will be discontinued for officers of the Crown to throw no difficulty in the way of any proceedings for the purpose of bringing matters before a Court of justice where any real point of difficulty that requires judicial decision has occurred.

This quotation has been referred to with approval in The Eastern Trust Company v. McKenzie, Mann & Co., supra note 3.

[51] Macbeath v. Haldimand, supra note 40.

2. Conclusion

Thus far, I have attempted to show that both the coercive resources and public duties[53] of the State make it fundamentally different from the individual. This fact is easily lost sight of because the private law model, in pursuit of a paradoxical strategy to protect individual autonomy, must insist on the presence of an analogue.[54] Accordingly, whether the State can be likened to the individual is not generally a matter of judicial inquiry--it is the accepted starting point. Second, the integral differences between individual and State are hidden by the preference of legal scholars for a particular juristic theory of the State. As discussed in Chapter One, this means regarding the Canadian State independently from the sociological, political and intellectual activity which produces it and seeing the State as coextensive with an organization of legal structures. But regarding the State as being mostly about the procedurally correct exercise of power, instead of a relationship of liberal democratic ideas and institutional conduct, submerges the presence of solemn State obligations, individual dependence and citizen vulnerability.

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[52] It should be noted that the Supreme Court of Canada in Rudolph Wolff, supra note 45, leaves open the possibility that where the Crown's activities "are indistinguishable from those of any other litigant engaged in a commercial activity," a section 15 Charter comparison might be "just and appropriate," at 397. The opening left here, however, is very small indeed because the Supreme Court of Canada has applied Rudolph Wolff to a case involving what would appear to be an extremely commercial matter--a contract to repair a wharf in Nova Scotia. See R. v. Dywidag Systems International et al (1990) 40 C.L.R. 1 at 4 (S.C.C.).

It could be argued that the Government's activity in Dywidag was not purely commercial as its contractual obligations were incurred for the benefit of the people of Nova Scotia. If this argument is correct, then there can be no real exception to the principle in Rudolph Wolff because all Government contracts must be entered into for the public good. See supra footnote 32. If this is true, then there exists high judicial recognition that the State is intrinsically different from the contracting individual even in highly--if not fully--commercial matters.

[53] As both Cohen and the Law Reform Commission of Canada point out, the modern State provides a wide array of benefits and services. See Cohen, supra note 14 at 382 and 401 and the Law Reform Commission of Canada, supra note 15.

[54] As discussed earlier in this Chapter, the assumption is that to best protect the individual from overarching State power, the law should deny any formal recognition of the identity of the State when it is in the contractual arena.

II. THE ACCURACY OF THE MODEL

The private law model seeks to absorb the primary differences between individual and State but it cannot consistently accomplish that task. First, to do so would be entirely contrary to basic principles of a liberal democracy. Second--and this is a related point--application of the model is modified by public law principles which are derived from liberal democratic theory, on the one hand, and the historical incidents of power, on the other. These principles are not formally organized nor are their limits judicially explored because they are seen as exceptions to the general rule. Nonetheless, they distinguish the State contract from legal agreements between individuals and so compromise the operation of the private law model. Indeed, as I will discuss in this section, the State contract is not governed by private law elements alone but by an unstructured array of constitutional, administrative, and contractual principles in addition to the incidents of sovereignty found in the Crown's legislative, common law, and prerogative powers.

1. Freedom of Contract

The private model of contract assumes that the State and individual share a parallel--if not identical--freedom of contract. But we have already seen that liberal democratic theory places upon the State additional duties, including duties to act in the interests of the public good and respect its relationship with the contracting individual. The State's freedom to contract is curtailed accordingly.

The private law model is unable formally to accommodate the dual fact of State power and obligation. There are, however, common law principles, albeit limited, which expressly override the model and restrict what kind of contract the State can enter.

In accepting that the State and individual are not analogical, and that legal consequences flow from differences, these principles contradict the private law model in the name of liberal democratic values. They testify against the model's descriptive accuracy and usefulness. Unfortunately, as I will show, because the principles are seen to co-exist with the model as mere exceptions, their application is not generally clear, their scope is sometimes tentative, and their significance is always undervalued.

i. The exercise of governmental power must be consistent with the Canadian Constitution

The State's exercise of its executive powers, whether they derive from "statute, common law or prerogative, must be adapted to conform with constitutional imperatives."[55] Even decisions made by cabinet, however political, "are all subject to judicial scrutiny for compatibility with the Constitution"[56] because they constitute a matter within the authority of Parliament or the legislature, pursuant to section 32[illegible]) of the Charter.[57] As Mr. Justice Dickson states: "I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter."[58]

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[55] Air Canada v. Attorney General of British Columbia [1987] 1 W.W.R. 304 at 309 (S.C.C).

(continued...)

That Charter constraints apply to the State contract is confirmed by the Supreme Court of Canada's decision in Douglas College v. Douglas/Kwantlen

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[55](...continued)

In this case, Air Canada had issued a petition of right to bring an action for a governmental accounting based on the alleged unconstitutionality of a taxation statute. On the advice of the Attorney-General, the Lieutenant-Governor denied to grant his fiat. Justice La Forest, for the Supreme Court of Canada, found that the exercise of the Lieutenant-Governor's discretion here was reviewable: "In my view, if even a statute cannot permit the retention of moneys obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of the supposed discretion," at 309.

See too Retail, Wholesale & Department Store Union v. Dolphin Delivery [1986] 2 S.C.R. 573.

[56] Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441 at 455. At issue here was a federal cabinet decision to allow the testing of American cruise missiles over Canadian territory. The appellants alleged that such a decision was contrary to section 7 of the Charter as being contrary to security of the person, at 448.

[57] Ibid at 455 and 463-464.

Section 32(1) of the Charter provides:

> This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the Legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[58] Ibid.

Faculty Association.[59] In that case, the Supreme Court of Canada determined that first, the actions of a Crown agency (here a community college) in negotiating and administering a collective agreement constituted an action of government for the purposes of section 32 of the Charter;[60] second, that the collective agreement was "law" within the meaning of the section 15 equality provision of the Charter,[61] and third, to the extent that the impugned contract violated Charter rights, it would be unenforceable: "To permit government to pursue policies violating Charter rights by means of contracts and agreements with other persons or bodies cannot be tolerated."[62]

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[59] Douglas College v. Douglas/Kwantlen Faculty Association (December 6, 1990) (S.C.C.)[unreported.] For the text of section 32, see supra footnote 57.

[60] Ibid.

[61] The majority found the agreement to be "law" because it involved a mandatory policy, ibid at 11. Even working with this minimum standard, a State contract would be "law" as it too reflects government policy with respect to what goods and services are needed and on what basis.

Section 15(1) of the Charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[62] Ibid.

It should be noted that the Court contemplated the possibility of an individual bargaining away some of his or her rights--such as the right not to be discriminated against on the basis of age--if it is rational, at 11. The Court would be unlikely to find as rational the bargaining away of the right not to be discriminated on the basis of race, however, at 11. Note too Justice Sopinka's dissent in Douglas College:

> Both La Forest and Wilson JJ. are of the view that the mandatory retirement provisions in the collective agreement qualify as "law" under

(continued...)

Such a constraint on the State's freedom of contract is mandatory from the perspective of liberal democratic theory. Clearly, the State must respect Canada's "supreme law;" it could not be at liberty to ignore the idea of the Canadian State, to violate the rights and freedoms of its citizenry, and to disregard through its own contractual conduct the requirements of justice in the community.

By way of contrast, contracts between individuals are not subject to provisions of the Charter--though provincial human rights legislation may impose limitations--because no governmental action is involved. It is assumed that in the private sphere, individuals can take care of themselves and are more free to be bound to the terms they please. Further, as the British Columbia Court of Appeal expresses it, one ought to reject the Charter's application to private arrangements because:

> It is a rare commercial contract which does not ex facie infringe on some freedom set out in section 2 or some legal right under section 7 [of the Charter.] To include such private commercial contracts under scrutiny of the Charter could create havoc in the commercial life of the country.[63]

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[62](...continued)
s. 15 of the Charter notwithstanding that such "policies" may be the product of fair negotiations reflecting the desired objectives of both parties. I respectfully disagree that the consensual nature of the policies in question may be so discarded in the examination as to whether they constitute "law." In this regard, I share the misgivings of my colleague Justice Cory, as expressed in McKinney, with the proposition that an individual cannot, under any circumstances contract out of the rights of equality in matters pertaining to age, at 2.

[63] See Re Bhindi (1986) 29 D.L.R. (4th) 47 at 54 (B.C.C.A.), quoted with approval in McKinney, supra note 24 at 23, where the Court held that the Charter is not applicable to a private contract.

Note that in Re Bhindi, the trial judge expressly rejected the argument that the Charter should apply to all contracts as the State has a presence in every aspect of society. See Re Bhindi (1985) 20 D.L.R. 391 (Q.B.). See too Dolphin Delivery Ltd., supra note 55.

ii. The exercise of government power must be consistent with the State's statutory powers and duties

The State cannot fetter by contract its statutory power to enact, amend, or repeal legislation.[64] Its legislative powers are to be exercised for the public interest alone[65] and not in furtherance of a contractual obligation. Similarly, the public interest requires that neither the government nor a public authority contractually disable itself from performing a statutory duty or from exercising a discretionary power conferred by or under a statute.[66] A contract which is incompatible with the government's legislative obligations and "statutory birthright"[67] fails.

The private law strategy of recasting as exceptional a dominant and subsisting aspect of the State's identity--namely its legislative powers and statutory obligations--produces a perplexing result. In order to make the State fit the private law model, it is said that the State is like the individual in a contractual setting. Yet should the State act like an individual and not concern itself with its unique legislative and discretionary duties, the model reminds the State of its true identity,[68] holds it to that standard, and cuts back on the freedom of contract it originally seemed to have. This convolution makes one question yet again the model's analogical starting point.

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[64] Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth [1977] 139 C.L.R.54 at 71 (H.C.Aus.); The King v. Dominion Stamp of Canada [1930] S.C.R. 500; Esquimalt & Nanaimo Railway Company v. A.G. of B.C [1949] 2 W.W.R. 1233 (P.C., on appeal from the S.C.C.).

[65] Ansett, ibid at 71. See too Wade, supra note 32 at 400.

[66] Ansett, ibid at 74.

[67] Kell-Erny's Enterprises v. Dyck (1987) 34 D.L.R. (4th) 456 at 461 (B.C.C.A.).

[68] See Ansett, supra note 64 and other cases cited in footnote 64. See too Kell-Erny's Enterprises, ibid.

and the coextensive freedom of contract which it presumes between State and individual.

iii. The principles of review

Individuals bargaining in the marketplace owe each other a minimum regard because liberalism assumes that each person will look to his or her own interests; further, it seeks to be neutral concerning how people ought and ought not to interact.[69] Of course, the law enforces limits so that contracts retain the level of voluntariness and fairness required to be contracts properly so called. The law does not tolerate, for example, fraud, misrepresentation extortion, duress or unconscionable behaviour.[70] Nor is the State allowed to bargain in such unacceptable ways. But in addition, the State is subject to unique judicial scrutiny because it is the State. Though the grounds for and scope of judicial review remain unclear, to the extent that the State's contractual conduct is justiciable where the individual's conduct is not, their respective freedom of contract does not coincide. Put another way, if the State's conduct is specifically regulated in the contractual arena, it is not empowered to enter any arrangement it pleases. It can only strike an agreement which is the product of an approved kind of bargaining.

Beyond the requirement of constitutionality discussed earlier, there is no general proposition concerning judicial review of the State contract. We do know, however, that--unlike the individual--the State owes a duty of fairness in certain contractual situations. In 1990, for example, the court in Thomas Assaly[71] asserted that governmental decisions concerning the acceptance or rejection of tenders:

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[69] Collins, supra note 9 at 1.

[70] See Treitel, supra note 16, Chapters 9, 19, 11, and 12.

> directly affect the interests of persons invited to bid...There is therefore attached a duty of fairness which courts can enforce by certiorari... a public law remedy to control the proper exercise of governmental powers.[72]

A similar determination to ensure fairness in the awarding of governmental contracts is at work in Glenview Corp v. Canada (Min. of Public Works):[73]

> The Court must be vigilant in assuring itself that the Crown is acting in the utmost good faith and is not actually attempting to obviate the tendering process.[74]

But in both Thomas Assaly and Glenview, the courts confine themselves to the tendering context. We still have no judicial pronouncement on whether the executive owes a duty of fairness in all its contractual dealings, whether established by tender or not.[75] We still have no Canadian position on whether the question of review is also dependent on the contractual power being exercised statutorily as opposed to being an incident of the State's common law powers.[76] We still do not

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[71] Thomas C. Assaly Corp. v. Canada (1990) 34 F.T.R. 156 (T.D.).

[72] Ibid at 158. In this particular case, fairness required that "the party whose interests are to be affected by a decision be aware of the issues he [sic] must address to have a chance of succeeding," at 159.

[73] (1990) 34 F.T.R. 292 (T.D.).

[74] Ibid at 296. Note that there is recent obiter commentary in favour of the proposition that the Government does not owe a duty of fairness when involved in a purely commercial contract which does not affect the public interest. See St. Lawrence Cement v. Ontario (Minister of Transportation) (1991) 3 O.R. (3rd) 30 (Ont.Ct.G.D.) in which the court determined that, within the context of the Ontario Government's tender call for the reconstruction of a public highway, the Government owed no duty of fairness. Given the Supreme Court of Canada's decision in Dywidag Systems which implicitly determined that a contract for the construction of a wharf in Nova Scotia was not a purely commercial matter, the reasoning in St. Lawrence Cement is suspect. See my discussion of Dywidag, supra footnote 52.

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[75] What is ironic about the absence of a clear judicial position is that opportunities to state the law have presented themselves but not been seized by the Courts. In Quasar Helicopters Ltd. v. The Queen [1983] 1 F.C. 536 (T.D.), for example, the plaintiff brought action against the Government for failing to consider a tender which--unknown to the government at the time despite its best efforts--in fact, had met all statutory and regulatory prerequisites to consideration. The plaintiff argued that the government owed it a duty of fairness--here to consider tenders which meet the requisite preconditions--and breached that duty in failing to do so. Instead of providing some guidance on this point, the Court seized upon the fact that the Government had attempted to be scrupulously fair in determining whether the plaintiff's tender was eligible but the procedure proved unavoidably fallible. On this basis, the Court asserted, at 563:

> The procedure was fair and was followed. Accordingly there was no breach of the duty of fairness by the Minister and his servants, assuming there was such duty which counsel for the defendant contended did not exist and which I do not decide.

Note that, because the government in Quasar had not been negligent, the respondents could not even rely on the case of Walter Cabott Construction Ltd. v. The Queen (1988) 44 D.L.R. (3rd) 82 at 98 (F.C.T.D.) which held that "the relationship between the person who invites tenders on a building contract and those who accept that invitation is such a particular relationship as to impose a duty of care upon that person...."

[76] To the extent that a contract is based on a statutory or delegated statutory power, one could argue that a duty of fairness is also owed. This is because administrative law already recognizes the public interest in the proper exercise of all statutory and statutorily delegated power. See Board of Education of Indian Head School Division v. Knight [1990] 3 W.W.R. 289 at 306 (S.C.C.).

It is not always clear however, whether an executive contract is the product of the State's common law power to contract or if the authority is statutory. See Arrowsmith's recitation of case law in support of the both propositions, supra note 36 at 138-143. Accordingly, the scope of review in Canada is still not known.

It is worth noting that the confusion outlined above could be avoided if Canadian Courts would adopt the reasoning of the House of Lords in Council of Civil Service Unions v. Minister for Civil Service [1985] A.C. 374 (H.L.) (hereafter C.C.S.U.). There, at 410, the Court takes the position that the availability of judicial

(continued...)

know the extent to which administrative law principles of natural justice are relevant to the State contract.

For now, it is enough to note that an important public law standard has been adopted into the private law regime of State contracts. Assaly and Glenview may mark the beginnings of a trend whereby the judiciary seeks to ensure that governmental decisions are made on the basis of fair procedure. This, in turn, reduces the competence of the private model to account for the law of State contracts and to provide direction for the future.

Related evidence of a judicial movement towards reducing the State's freedom of contract is found in the relatively new doctrine of legitimate expectation.[77] Under its English rubric, the doctrine provides that all executive conduct[78] is subject

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[76](...continued)
review should not turn on whether the impugned act has a statutory or common law source:

> I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason alone be immune from judicial review.

[77] For discussion by English courts of the doctrine of legitimate expectation see, for example, Schmidt v. Secretary of State for Home Affairs [1969] 1 All E.R. 904 at 909 (C.A.); Attorney-General for Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629 at 636 and 638 (P.C.); O'Reilly v. Mackman [1983] 2 A.C. 237 (H.L.); Reg. v. Liverpool Corporations, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299; and C.C.S.U., supra note 76.

[78] That legitimate expectation applies to executive action is underscored by Lord Roskill who asserts in C.C.S.U., ibid at 417:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged.

to judicial review on the grounds of "illegality," "irrationality" and "procedural impropriety." What follows is Lord Diplock's account of these grounds:

> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his [sic] decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness"....It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system....
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal [should one be involved] to observe procedural rules...even where such failure does not involve any denial of natural justice.[79]

Lord Diplock's statement of the law goes beyond the traditional principles of administrative review in two ways. First, it renders justiciable the State's contractual conduct[80] when the individual's interests are materially affected.[81] Second, by requiring procedural propriety, the doctrine can demand more than simple fairness. It can require that the State be fair in very specific ways. For example, if a citizen reasonably assumes that a given procedure will be employed by the State in order to make its determination, the doctrine of legitimate expectation requires the State to comply with that reasonable assumption. As the court provided in Ng Yuen Shiu:

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[79] Ibid at 410-411.

[80] C.C.S.U., ibid, involved a Minister unilaterally altering a term of employment pursuant to an Order-in-Council and Service Code entitling her to do just that. The Court found, however, that the Minister's employees--due to a long standing practice of consultation within the Department--would normally have had the right to be consulted on the government's decision to change a significant condition of their employment, at 412-413. However, the Government successfully argued against the duty to consult given the interests of national security, at 413.

> when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.[82]

Similarly, if the citizen has a legitimate expectation that he or she will receive a benefit from the State based on well established practice, "the courts will protect his [sic] expectation by judicial review as a matter of public law," even if the person "has no legal right" to the benefit as a matter of private law.[83] And while the judicial enquiry is never one which goes to the merits,[84] the objective is for the court to review the impugned proceedings "so as to ensure, as far as may be, that justice is done."[85]

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[81](...continued)

[81] According to Lord Diplock, ibid at 408-409, an individual can invoke the doctrine of legitimate expectation, inter alia, when the government, or other public body, alters an individual's legally enforceable rights or obligations, or alternatively, withholds from the individual a benefit contrary to past dealings or express assurances.

[82] Ng Yuen Shiu, supra note 77 at 638.

[83] C.C.S.U., supra note 76 at 401 per Lord Fraser of Tullybelton.

[84] As the Court in C.C.S.U. states, ibid at 401, quoting Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155 at 1173: "Judicial review is concerned, not with the decision, but with the decision-making process."

[85] Per Lord Denning in Reg. v. Secretary of State for Home Affairs, ex parte Hosenball [1977] 1 W.L.R. 766 (C.A.), quoted with approval in C.C.S.U., ibid at 400.

The doctrine of legitimate expectation has recently been considered by the Supreme Court of Canada in Old St. Boniface Residents Association Inc. v. The City of Winnipeg and the St. Boniface-St. Vital Community Committee.[86] In that case, the court referred to the doctrine in light of a dispute regarding rezoning by the City of Winnipeg. The appellants alleged, inter alia, that the City planning committee assured them of an opportunity for consultation prior to development. But, despite their "legitimate expectation," no such consultation occurred.[87] Mr. Justice Sopinka summarized the case-law regarding the doctrine of legitimate expectation in the following terms:

> The principle developed in these cases [including C.C.S.U and Ng Yuen Shiu] is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.[88]

Unfortunately, his Lordship expressed no opinion on the general application of the doctrine in Canada. He simply determined that the planing and zoning process itself provided the appellants with an adequate opportunity to be heard:

> Even if the conduct of this [planning] Committee raised expectations on the part of the appellant, I am of the opinion that this would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation.[89]

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[86] (December 20, 1990), (S.C.C.)[unreported.]

[87] See the judgment of Sopinka J., ibid at 35.

[88] Ibid at 36-37.

[89] Ibid at 37.

The English doctrine of legitimate expectation has, however, been accounted for in more detail by the British Columbia Court of Appeal. In Reference re: Canada Assistance Plan Act,[90] the Court of Appeal describes the doctrine as evolving over the past 30 years out of administrative law,[91] and finding certain origins in the decision of Martineau v. Matsqui Institution Disciplinary Board.[92] In that case, the Supreme Court of Canada recognized that administrative tribunals owed a duty of fairness. As Mr. Justice Dickson (as he then was) asserted in Martineau:

> Lord Denning aptly summarized the state of the law on this aspect in Schmidt v. Secretary for Home Affairs [1969] 2 Ch. 149 (C.A.). There, the Master of the Rolls stated:
>
> > "The speeches in Ridge v. Baldwin...show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."[93]

As we have seen, the doctrine of legitimate expectation and other incidents of fairness reach beyond the administrative tribunal now. Indeed, the court remarks in Reference re: Canada Assistance Plan Act that:

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[90] (1990) 71 D.L.R. (4th) 99 (C.A.), under appeal to the S.C.C.

[91] Ibid at 129.

[92] [1980] 1 S.C.R. 602.

[93] Ibid at 618-619.

> the scope of judicial review has been expanded to include not only bodies exercising administrative powers but also exercising quasi-judicial powers and executive powers.[94]

In the lower Canadian courts, the doctrine of legitimate expectation has received a largely favourable reception. It has been applied in its English form by the Federal Court of Appeal,[95] the British Columbia Court of Appeal[96], the Ontario High Court of Justice,[97] as well as being referred to with approval in numerous other instances.[98] Only in Alberta has the doctrine been rejected for being based on a distinction which does not "reflect a principle that can withstand scrutiny in the light of the object of judicial review by certiorari."[99]

It is apparent that the kind of review favoured by the courts in Assaly and in Glenview, as well as by those which recognize the doctrine of legitimate expectation, originates in administrative law and is intended to protect the individual from the improper exercise of State power.[100] This is always a legitimate judicial concern in a liberal democratic society. In order to preserve the reciprocity between governor and governed, to enforce State duties of governance, and to reduce individual vulnerability, the principle of judicial review constrains--albeit currently on an unsystematized and incomplete basis--the State's freedom of contract. The beginnings of judicial review--whether derived from administrative or constitutional grounds--require the governor to treat the individual fairly[101] in spite of the private law model and the individual-State analogue.

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[94] Supra note 90 at 129.

[95] Bendahmane v. Minister of Employment (1989) 95 N.R. 385 at 392-393 (F.C.A.).

[96] Reference re Canada Assistance Plan, supra note 90.

[97] Ontario Nursing Home Association et al. v. The Queen in Right of Ontario (1990) 72 D.L.R. (4th) 166 (H.C.J.). Here, in recognizing the doctrine, the Court also recognized that it cannot "impose a positive obligation on government to grant substantive rights," at 180.

[98] For the more recent examples, see St. Lawrence Cement Inc. v. The Queen in Right of Ontario, supra note 74; Rainbow v. Central Okanagan School District No. 23 [1990] B.C.J. No. 2057 (B.C.C.A.); Central Kootenay (Regional District v. Canada (Minister of Transport) (1990) 39 F.T.R. 60 (T.D); Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation) (1991) 2 O.R. (3rd) 716 (Div. Ct.); Piche v. Canada (1989) 98 N.R. 148 (F.C.A.); and Pacific Fishermen's Defense Alliance of Canada v. Canada (1987) 84 N.R. 387 (F.C.A.).

[99] Hutfield v. Board of Fort Sask. General Hospital District No. 98 (1986) 49 Alta. L. R. (2d) 265 at 267 (Q.B.), affirmed on other grounds (1988) 60 Alta. L.R. (2d) 165.

2. Equality of Bargaining

There are, as I discussed earlier, two features of the State which make it unbridgeably different from the individual--its duties of governance and coercive resources. We have seen that the presumption of a coextensive freedom of contract between individual and State is fallacious because it submerges these differences. The private law's presumption of equality of bargaining is also fallacious and uses a similar submerging technique. The model concludes that the individual and State are contractual equals because it recognizes only exaggerated forms of inequality such as incapacity, duress and unconscionability.[102] It concludes that equality is present based on an unrealistically restrictive notion of what would count as inequality. To demonstrate my contention that there is a basic and formal inequality between individual and State, I will explore three ways in which State power in the contractual arena undermines the private law's assumption of equality. They are: Crown prerogatives; State control over its internal organization; and State control over contractual terms.[103] To the extent that these factors give the State advantages in the bargaining for and enforceability of its contracts, they impugn, yet again, the descriptive accuracy of the private law model.

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[100] Wade defines the primary purpose of administrative law as to "keep the powers of government within their legal bounds, so as to protect the citizens against their abuse. The power engines of authority must be prevented from running amok." See supra note 32 at 5.

[101] Assuming the absence of a legal relationship, an individual's legitimate expectation regarding what another individual ought to do has, in general, no legal consequences and affords no private law remedy. See O'Reilly, supra note 77 at 275.

[102] See Treitel's account of these forms of inequality in supra note 16.

a. Crown prerogatives.

Crown prerogatives are an historical incident of sovereignty and so constitute a unique category of privilege. According to Blackstone:

> By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from prae and rogo), something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the kind enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects.[104]

Because prerogative powers give immunity to the State from certain common law liabilities and duties, they refute the analogical premise of the private law model by enforcing legal distinctions. There are complex prerogative rules[105] covering a wide array of subject matter including: the bindingness of statutes on the State; the employment of Crown servants; the availability of judicial remedies against the State such as injunction, specific performance, distress, garnishment and attachment; State liability for interest; as well as its susceptibility to the doctrines of estoppel, waiver and laches.[106] Due to the scope of the project, I do not propose to engage in a thorough review of the law of prerogatives in order to establish my point that the individual is not the State's contractual equal. Instead, I will discuss the State's immunity from the doctrine of estoppel, since this has a very direct on State's contractual obligations.

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[103] It should be noted that prohibitions, discussed in the previous sections, against the State entering into contracts which are contrary to the Canadian Constitution or which fetter the State's statutory powers and duties demonstrate an inequality between individual and State, but one operating in the opposite direction.

[104] Blackstone, Commentaries on the Laws of England, vol. 1 (Chitty ed. 1826) 238-239 (references deleted).

Sherwin Lyman identifies estoppel[107] as a Crown prerogative which reaches back at least as far as the early seventeenth century.[108] He notes that in 1613, the English courts held the Crown not to be bound by fictions of law[109] and in 1623, determined that the Crown was not bound by a fiction of law known as estoppel.[110] The entire matter is summarized in Everest & Strode's Law of Estoppel,

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[105] As Holdsworth has asserted, with respect to Crown prerogatives in A History of English Law:

> This miscellaneous collection of rights and privileges, which make up the incidental prerogatives of the Crown, come...from many different periods in English legal history, and are based on many different ideas....All of these diverse ideas have, from an early date, become the starting-points for the continuous development of bodies of very technical rules, some of which are wholly or partially obsolete, while others have survived and function in an environment to which they are ill-suited.

Quoted with approval by the Alberta Court of Appeal in Re: Associated Investors of Can. Ltd. (1988) 84 A.R. 241 at 246, per Kerans J.A.

[106] See, for example, Hogg's account of the Crown prerogatives and immunities, supra note 10.

[107] There is no definitive account of equitable estoppel by conduct but Lord Denning's attempt is useful:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this. When a man [sic], by

(continued...)

> it appears from the authorities that the King is not bound by estoppels, though he can take advantage of them. Thus, it is laid down in Viner's Abridgement that the King is not bound by estoppels....[111]

But though the origin of the prerogative is clear, its modern day scope is contested and polemically so. For example, Lyman writes: "Estoppel is, in Canada, ineffective against the Crown,"[112] but Hogg contends: "The Crown is bound by the law of estoppel."[113] And there is much case law cited by both writers in favour of their respective positions.[114]

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[107] (...continued)

> his words or conduct, had led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

See Moorgate Mercantile v. Twitchings [1975] 3 All E.R. 314 at 323 (C.A.).

[108] "Estoppel and the Crown" (1978) 9 Manitoba Law Review 15 at 15-16.

[109] Sheffield and Ratcliff (1613), Jenk. 287; 145 E.R. 207 (Ex. Div.), referred to by Lyman, ibid at 16.

[110] Sir Edward Coke's Case (1623), Godbolt 289 at 299, referred to by Lyman, ibid.

[111] (1907) at 8, quoted by Lyman, ibid.

[112] Ibid at 15.

[113] Hogg, supra note 10 at 189.

[114] See Lyman's entire article, supra note 108 and see Hogg, ibid at 189-191, including notes.

But even if it were possible, it is beyond the scope of this paper to resolve the debate between Lyman and Hogg.[115] Instead, I propose to explore an incontestable strand of the Crown's immunity from estoppel and one which has a significant impact on the State contract. That strand has been succinctly summarized in the following terms:

> where a particular obligation or duty is imposed by statute or regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation.[116]

This Crown immunity constitutes an important example of inequality between individual and State in the contractual arena. It means that in every statutory contract, estoppel cannot lie against the State. Indeed, because the terms and conditions of a statutory contract are legislative,[117] any State representation which does not align is contrary to law and so unenforceable through estoppel.

Statutory contracts are by no means unusual. They dominant in all industries involving the exploitation of State-owned natural resources and are made in the context of State-run insurance and pension schemes.[118] In these kinds of contracts at least, the private law model is significantly displaced because different rules of reliance and liability apply.[119]

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[115] Part of the difficulty in resolving uncertainly regarding the scope of the Crown's immunity relates to the numerous circumstances in which the immunity might be invoked and a failure to distinguish amongst them. What is required is an analysis of the types of situations in which the State invokes its immunity from estoppel and the judicial outcome. Lyman provides an effective beginning to this project, supra note 108.

[116] Millet v. The Queen [1954] Ex.C.R. 562 at 572. See too St. Ann's Island Shooting and Fishing Club Ltd. v. The King [1950] S.C.R. 211 at 220 which provides that "There can be no estoppel in the face of an express provision of a statute." See too case law cited in favour of this proposition in Paul Lordon, Crown Law (Toronto: Butterworths, 1991) at 321. My research has found no case which contradicts this particular statement of law.

[117] See Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Limited (1983) 49 Nfld. & P.E.I.R. 181 at 211 (Nfld. S.C.); affirmed on other grounds in (1985) 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.); affirmed on both grounds in [1988] 1 S.C.R. 1085. See also Millet, ibid at 570.

An illustration of the State's prerogative is found in a 1983 decision of the Newfoundland Trial Division. In Churchill Falls,[120] the Government of Newfoundland (hereafter "the government") statutorily leased to the defendant (hereafter "CFLCo") the right to exploit and sell Churchill Falls produced energy. Clause 2(e) of the lease provided that "upon the request of the Government[,] consumers of electricity in the province shall be given priority where it is feasible and economic to do so."[121] On the basis of express representations from the government that what it required pursuant to clause 2(e) would be 300MW of electricity, CFLCo contracted to sell to Quebec Hydro all the remaining energy it produced, beyond that 300MW. Subsequently faced with increased energy needs, the government by Order-in-Council demanded 800MW. When CFLCo refused to comply because of its contractual commitment to Hydro Quebec, the government sought a declaration of entitlement from the court.

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[118] See Millet, ibid.

[119] It is, of course, true that if the individual were to make representations to the State which contradicted the terms of a statutory contract, estoppel would not lie against the individual. One could therefore argue that the Crown's immunity from estoppel within this context is no different than that enjoyed by the individual. There are two points to be made in opposition to this argument. First, the statutory contract--reflecting the State's superior bargaining position--is largely comprised of terms which give the State specific rights, powers, and privileges. There are few clauses in favour of the individual. Second, even on those occasions where an individual has waived a privilege and successfully resisted the doctrine of estoppel due to the statutory nature of the contract, the State remains competent to amend by legislation the statutory contract in question and so make it accord with the terms of the individual's representation. In these two fundamental ways, therefore, the individual's "immunity" from estoppel is largely theoretical and practically weak.

[120] Supra note 117.

[121] Ibid at 194.

One of the defenses which CFLCo raised was estoppel and it did so with very good reason. As the court points out:

> There were discussions between the Government and CFLCo in which the Government held out that a recapture provision of 300 MW would be satisfactory to it. CFLCo relied on this and held out to Hydro Quebec that that was the position of Government. Hydro Quebec relied on this....
>
> It has all the earmarks of estoppel. The Government held out a certain position and CFLCo relied upon this position and acted upon it.[122]

Hence, but for any prerogative immunity, the representations would have been binding.[123]

However, as the lease was statutory, the court found that clause 2(e) represented the will of the House and could not be altered by the representations of a government official:

> The lease by itself is a contract between the Government and CFLCo. It is something more, however. It is part of an act of the House of Assembly....It has legislative sanction. The law of the land is that the Newfoundland consumer, upon the request of the Lieutenant-Governor, be given priority. No person, however highly placed, may deny that right to the Crown, or limit it. Only the House of Assembly may do that.[124]

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[122] Ibid at 240.

[123] Ibid at 241.

[124] Ibid at 243.

Accordingly, and leaving open the possibility that estoppel might be available against the Crown in certain circumstances, the court found that estoppel would not lie.[125]

In disposing of the case, the court did determine that the government was not entitled to all the energy it was seeking. Due to the court's interpretation of clause 2(e), the government was entitled only to recapture energy which was surplus to CFLCo's contractual obligations.[126] On appeal, the matter of estoppel was not discussed by the court.[127] On further appeal, the Supreme Court of Canada endorsed the approaches taken by both lower levels without further comment.[128]

Churchill Falls is not the first example of a person seeking unsuccessfully to rely on official representations within the context of a statutory contract. In the earlier decision of Millet v. The Queen,[129] at issue was a contract made pursuant to the Veterans Insurance Act.[130] The plaintiff sought to claim on a life insurance policy which the government had purported to cancel for nonpayment of premiums. While, in fact, the last two premiums were overdue, the plaintiff sought to raise estoppel against the State on the basis that previous late payments had been accepted by government officials without cancellation.[131]

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[125] Ibid at 242-243.

[126] Ibid at 313.

[127] Churchill Falls Corporation Limited (C.A.), supra note 117.

[128] Churchill Falls Corporation Limited (S.C.C.), supra note 117.

[129] Supra note 116.

[130] S.C. 1944-45, 8 Geo. VI, c. 49.

[131] Supra note 116 at 570.

The judge found, however, that estoppel could not lie:

> The Veterans Insurance Act and its regulations...is the law of the land applicable to this contract of insurance. The contention that these regulations [governing when payments are due] did not bind the parties or have the force of law is not based on any sound reason.[132]

The plaintiff's petition of right was accordingly dismissed.[133]

From a liberal democratic perspective, aspects of the State's immunity from estoppel can clearly be defended. The immunity is intended to protect the public good[134] and ensure that the State officials are held to the Rule of Law.[135] Yet, even as these interests are elevated, the integrity of the State is subject to compromise because what is tolerated is the making of official representations without legal consequences. A necessary corollary is that the individual who has relied on the State cannot obtain relief. This is problematic from the perspective of fairness generally and individual rights specifically.

Further, the State's residual power to contradict itself[136] in legally unchallengeable ways belies the analogical premise of the private law model. The individual and the State do not share equivalent legal resources, but this escapes the attention of a model which is only alert to inequality evidenced by duress, incapacity, or undue influence. The conclusion of equality is merely the restatement of its own premise.

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[132] Ibid.

[133] Ibid at 572.

[134] Laker Airways v. Dept. of Trade [1977] 2 All E.R. 182 at 194 (C.A.) and R. v. McLeod (1883) 8 S.C.R. 1.

[135] Churchill Falls (Nfld. S.C.), supra note 117 at 243 ; Millet, supra note 116 at 570.

[136] See also Patrick McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979) 17 Osgoode Hall Law Journal 160.

b. The State's internal organization

The State's unusual control over the nature of its contractual obligations finds another source in the power emanating from the Government's internal organization. As the Law Reform Commission of Canada asserts:

> For the purposes of allegedly internal organization and operation, the Administration uses instructions, guidelines, manuals, directives and other similar practices which enable it to alter substantially the state of the law in many cases.[137]

While the Commission does not give examples of this phenomenon, they are not difficult to find. Take, for instance, the Federal Government's Treasury Board Manual, clause .4.2.2: "Conviction under Section 121, 124 and 418 of the Criminal Code[138] denies the capacity to contract with the Crown." Or consider the policy requirement providing that when the Government is contracting for goods and services worth $200,000 or more with a contractor employing 100 or more people, conditions of the Federal Contractors Program for Employment Equity must be met.[139] These are just two examples of the mandatory requirements[140] placed on the private party contracting with the State, requirements which have the very real effect of altering the law through means other than a legislative instrument. Control over the State's internal organization thus becomes a source of both real and potential power. But as the private law model has no mechanism to detect this reality, it accords it no formal significance.

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[137] Law Reform Commission of Canada, supra note 15 at 37 (references deleted).

[138] These provisions relate to the offenses of: frauds on the government (s. 21), selling or purchasing office (s. 124), and selling defective goods to her Majesty (s. 418).

[139] Federal Government's Treasury Board Manual, clause .4.2.5.

[140] Clause .4.1 of the Treasury Board Manual makes mandatory the policy requirements contained in it for "all departments and agencies, including departmental corporations and branches designated as departments for the purpose of the Financial Administration Act." See also clause .3 of the Manual.

c. Conditions of contracting

Another manifestation of State power and source of control over bargaining is found in the standard form contracts which set out the terms and conditions of the State contract. Like royal prerogatives and the Government's internal management policies, the standard form contract exerts influence over the quality of the State's contractual promise.

It is, of course, easy to exaggerate the oppressive implications of the standard form contract. As Trebilcock points out, use of the standard form may not be evidence of concentration of market power but rather, a desire to reduce transaction costs and "facilitate the conduct of trade."[141] Nonetheless, while it is true that most individuals are not forced to contract with the State,[142] the State is an enormous purchaser and a potentially lucrative source of income.[143] Being such a substantial consumer functions to give the Government a good deal of control over its obligations and liabilities and those which the individual is asked to assume. Indeed, as De Smith notes:

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[141] Michael Trebilcock, The Common Law of Restraint of Trade (Toronto: Carswell Company Limited, 1986) at 165.

[142] Further, under certain relatively rare circumstances, the individual is in a superior bargaining position, as in times of war and national shortage. See Mewett, supra note 33 at 233.

[143] For Federal Government procurement expenditures, see Arrowsmith, supra note 36 at 29 and accompanying notes.

> The Government is a large scale purchaser and is often able to impose its own terms on a contractor. There is no special body of case law governing the standard term contract; the quasi-legislative character of such contracts should be recognized and their terms subject to a measure of judicial review.[144]

Nor has the extent and effect of governmental control over the contracting process escaped those with experience in delivering procured goods and services to the Federal Government. Grant Murray of IBM Canada Ltd. has observed, as recently as 1986, the Government's "great reluctance to accept contract terms which are more in keeping with the terms and conditions commonly found in the commercial marketplace,"[145] thus placing an onerous burden on the private contracting party.[146] Take Murray's example of the Federal Government's short-form standard contract which he finds to be deficient for not addressing the issue of patent indemnification. It is industry practice, he notes, to insert a patent indemnification clause in contracts for the supply of data processing machinery because there are "literally thousands of patents relating to information-handling technology and, even with the best of intentions, it is possible to overlook a patent."[147] The Federal Government, however, will not allow a comparable clause. Rather: "it vigorously resists giving the supplier this escape and insists that the supplier leave the equipment in place and also indemnify the Government against all claims."[148]

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[144] De Smith: Constitutional and Administrative Law (4th ed.)(eds.) Harry Street and Rodney Brazier (Hammondsworth: Requin Books, 1981) at 612. The adhesive, legislative quality of the standard form government contract has been remarked upon by other legal scholars as well. See H. Street, Government Liability: A Comparative Study (Cambridge: Cambridge University Press, 1953) at 99 and 104 and W. Friedmann, Law in a Changing Society (2nd ed.) (New York: Columbia University Press, 1972) at 403.

[145] "Contracting with the Government" in the Law Society of Upper Canada Continuing Legal Education Series (Toronto: LSUC, 1986) 2 at 5.

[146] Ibid.

Other standard clauses, particularly the termination for convenience clause, can prove needlessly onerous on the private contracting party and unreasonably protective of the Government's interests--yet they constitute an ingredient in the standard short form contract. And when the termination clause is invoked the contractor is only entitled to be reimbursed for actual costs

> reasonably and properly incurred...but in no case shall such reimbursement exceed the Contract price or shall the Contractor have claim for damages, compensation, loss of profit or otherwise, except as herein provided.[149]

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[147] Ibid at 14.

[148] Ibid.

[149] See Supply and Services Canada Short Form DSS-MAS 9329 (General Conditions for the purchase of commercially available off the shelf goods and services.)

The effect of this clause is to disentitle the contracting individual from securing damages from the government for loss of expectation and loss of opportunity, to name two heads of damage. In addition, if the individual had entered into sub-contracts and then went into breach because the government invoked this clause, he or she could not look to the government for indemnification of any third-party liability.

This is not, I suggest, a clause one would readily agree to because it makes no effort to assess and distribute risk--it is all borne by the contractor.[150] Murray may well be correct when he describes the procurement process in the following terms:

> The system has been kept in place largely to give the Government the best of all possible worlds. On the one hand, the Government wants to procure everything at the lowest possible price...preferably lower than the lowest commercial price. On the other hand, if some problem develops with one of the Government's contractors, politicians want to be in a position to stand up in the house or before the media and say that the Government has not compromised its legal rights in any way and is, therefore, able to pursue all legal remedies.[151]

Because standard form contracts tend to be weighted heavily and explicitly in favour of the Government, and because contractual claims against the Federal Government can be handled by the federal Department of Supply and Services Contracts Settlement Board,[152] there is little reported case law on disputes arising out of these contracts. In instances where disputes are reported, the outcome is generally favourable to the Government. Take, for example, the Federal Court of Appeal decision in Government of Canada v. Construction JRL Ltee.[153] In that case, the respondent contracted to build on a riverbank at a fixed price. Its costs went well over estimates because of soil instability previously known to the Government of Canada (hereafter the government). At trial, the court held that while the government had no contractual liability for the cost overruns, it was liable for failing to warn the contractor of possible problems. The Federal Court of Appeal, however, reversed this decision because the contract excluded extra payments to the Contractor unless agreed to by the Owner's engineer.[154]

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[150] In fact, under French public law--known as droit administratif--termination for convenience clauses are classified as a clause exorbitante because they "confer rights or impose obligations upon the parties quite unlike in their nature those which anyone would freely agree to in the context of civil or commercial law." See L. Brown and J. Garner, French Administrative Law (3rd ed.)(London: Butterworths, 1983) at 88, quoting Stein, CE 20 October 1950.

[151] Supra note 145 at 78-80.

[152] According to Arrowsmith, supra note 36, though the Board's decisions are not binding on the individual contractor, they are accepted in over 95 percent of the cases even though the results are adverse to the contractor in 50 percent of the cases, at 79, footnote 76. Arrowsmith does not provide a figure on the number of cases which are resolved on the basis of an ex gratia payment.

[153] (1983) 52 N.R. 1 (F.C.A.).

That the State is well positioned through its standard form contracts is also evidenced in Entreprises de Transport Marcel Boivin Inc. v. Canada[155] which regards the matter from a civil law perspective. In that case, the plaintiff contracted to collect garbage from government sites. The government became dissatisfied, however, because the contractor left some sites untidy, on several occasions failed to pick up the garbage at all, and was difficult to contact by telephone. On the basis of these deficiencies, the government terminated the contract.

General Condition DSS-9076 (P-4) provided the following penalties for default:

> 16. Default
>
> (1) If the Contractor is in default in carrying out any of the terms, conditions, covenants or obligations of the Contract...the Minister may, by giving notice in writing to the Contractor, terminate the whole or any part of the Contract. Upon giving of such notice the Contractor shall have no claim for any further payment save as hereinafter provided, but shall remain liable to Her Majesty by reason of the default or occurrence upon which such notice was based.[156]

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[154] Ibid at 3 and 9.

[155] (1989) 44 B.L.R. 208 (F.C.T.D.)

[156] Ibid at 213.

Clause 15 entitled the party to a terminated contract to be paid "a reasonable price for performing any of the work that has been completed at the time of termination and other cost directly incurred...but in no event shall the aggregate of the price paid...exceed the total Contract price."[157]

The plaintiff argued that its defaults were not particularly serious and that the termination was accordingly wrongful. The court was unsympathetic:

> Seen from the standpoint of a contract for services between private parties, such clauses may undoubtedly appear draconian; but it should be noted that this is an administrative contract, where a public authority has decided to award a contract to ensure the proper functioning of a public service. While the government body is acting in the public interest, the other contracting party is acting in a private interest...."[D]efault [in administrative contracts] will be judged with a strictness and severity unknown to private law."[158]

The court found that, as the government had terminated in accordance with all the contractual terms, the plaintiff's action had to fail.[159]

By its in-house policies, procedures and standard form contracts, the Government seeks to protect the public interest. This is in accord with liberal democratic theory. Yet, evidence and commonsense show that Government officials will also try to secure unreasonably favourable terms in order to protect themselves from the consequences of seceding any of the State's superior bargaining position.[160] The private law model cannot accord any legal importance to this basic reality, however: it is content with its strong presumption of equality and knowledge that no one is forced to contract with the State.[161] This, in turn, may mean that the private law model ignores too much.

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[157] Ibid at 214.

[158] Ibid at 215, quoting with approval Pierre Lemieux, Les contrats de l'adminstration federal, provinciale et municipale (Sherbrooke, Revue du Droit Universite de Sherbrooke, 1981) on government contracts.

[159] Ibid at 215-216.

3. Temporally Fixed Source of Contractual Obligations

As earlier references to Treitel have shown, the private law model recognizes that a contract comes into existence upon acceptance of an offer: it is at this moment that rights and obligations of the parties solidify legally. With the obvious exceptions of fraud, estoppel, duress and misrepresentation, and other matters going to consent, the nature of any antecedent relationships between the parties is legally insignificant.

There are good reasons for this general proposition within the context of private, commercial relationships between individuals. The rule is intended to provide a measure of certainty in the market-place, to respect the individual's right to control effectively the nature and extent of the obligations he or she assumes, to put limits on what can and cannot be demanded by the other party. But there are equally good reasons for rejecting the application of this proposition to the State contract. Liberal democratic theory posits an inalienable relationship between individual and State, on the one hand, and State and society on the other. These relationships place mandatory obligations on the State even when it is in a contractual relationship: it must continue to demonstrate concern and respect for individual autonomy; it must seek to discover and act upon the common good. The private law model has no mechanism to enforce obligations from these pre-existing relationships because it locates obligation in the moment of acceptance only. To the extent that the private law model cannot accommodate a central component of liberal democratic theory makes it ill-suited to its task of defining State liability.

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[160] As Cohen points out, supra note 14 at 39, it may be dangerous to assume that:

> the bureaucracy is a benign entity simply fulfilling the wishes of its political or command masters. Other views are quite different. In these an activist, independent bureaucracy shapes state policy, and then actively implements that policy to achieve bureaucratically defined objects [references deleted].

[161] As another instance of State control over contractual terms, one can look to the Government of Alberta's standard petroleum and natural gas license which empowers the Government unilaterally to amend through legislation. The standard lease provides that the licensee is bound by the provision of the Mines and Minerals Act of Alberta as amended from time to time or any replacement thereof as well as by all present and future subordinate legislation.

4. Defenses to Liability

In addition to the defenses which flow from its prerogative powers, control over in-house procedure, or terms drafted in its favour, the State has unique defenses to relieve it from contractual liability.

a. Doctrine of executive necessity

There is some authority for the proposition that, as an incident of the Crown's common law power to contract, the State can invoke the doctrine of executive necessity to negate the existence of any alleged contract and so the consequences of an alleged breach. In Rederiaktiebolaget Amphitrite v. The Queen,[162] the court held that the British Crown's undertaking not to confiscate the plaintiff's merchant ship--which would otherwise be subject to seizure, on the ground that it was a foreign ship entering a British port during wartime--did not produce a contract because:

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[162] [1921] 3 K.B. 500,

> it is not competent to the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.[163]

Accordingly, when the British government seized the plaintiff's ship for undisclosed reasons, the plaintiff was left without a remedy as the court found there to be no contract between the litigants.

If the court in The Amphitrite is correct, it is difficult to imagine how Government would ever be legally constrained by its apparent contractual undertakings to do or not do certain acts. It is difficult to imagine how Government, unless it chose to submit itself, could ever be held civilly liable for failing to meet obligations which, absent this doctrine, would be contractual ones. Indeed, the case has the effect of stripping away contractual bindingness as every contract, no matter how modest, inconsequential and fleeting, constitutes a fetter on future executive discretion.

The decision has been roundly criticized[164] on these and related grounds--so

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[163] Ibid at 503.

[164] Critical commentary on The Amphitrite is legion. See Peter Hogg, supra note 10 at 171-172 and his footnote 51 where he cites critical discussion by scholars including: C. Turpin, Government Contracts (London: Penguin, 1972) at 19-25; M. Aronson and H. Whitmore, Public Torts and Contracts (Sydney: Law Book Co., 1982) at 194-202; R. Dussault and L. Bourgeat, Administrative Law: A Treatise (trans. Murray Rankin) (Toronto: Carswell, 1986) 540-547; S. Arrowsmith, supra note 36 at 125-130; Campbell, "Agreements about the Exercise of Statutory Powers" (1971) 45 Aus.L.J. 338.

(continued...)

thoroughly in fact, that little would be gained by duplicating the debate here--especially since The Amphitrite has never been followed[165] and shows no signs of life.

b. The Doctrine of State Necessity

The doctrine of state necessity, according to the Supreme Court of Canada, "provides a justification for otherwise illegal conduct of a government during a public emergency."[166] It was this doctrine which empowered the Supreme Court of Canada--in the name of the Rule of Law, legal order, and the avoidance of a "legislative void"[167]--to give Manitoba laws temporary effect notwithstanding their

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[164] (...continued)

See too Mason J.'s comment in Ansett Transport Industries (Operations) Pty. Ltd., supra note 64 at 74 that The Amphitrite's statement of law "has been criticized on the ground that is expressed too generally and so it is." Also at 74, Mason J. refers to adverse commentary on The Amphitrite in Sir William Holdsworth, "A Casebook on Constitutional Law," 45 Law Quarterly Review 166-167; P.W. Hogg, "The Doctrine of Executive Authority in the Law of Contract," (1970) Australian Law Journal at 338; J.E. Richardson, "The Executive Power of the Commonwealth" in Commentaries on the Australian Constitution (ed.) L. Zines, at 76-80.

Finally, see Graham Zelleck's recitation of commentators opposed to Rowlatt J.'s pronouncement in "Government Beyond Law" (1985) Public Law 283 at 286.

[165] Hogg, supra note 10 at 172. On this point, Graham Zelleck, ibid at 286 declares:

> [The doctrine of executive necessity] was constructed on the most fragile foundations, it is supported by neither previous nor subsequent authority, it is possibly obiter and it has been condemned by virtually every commentator and criticized by Denning J. (as he then was) as early as 1948 [references deleted].

My research shows no Canadian decision even considering, let alone following The Amphitrite.

[166] Per Chief Justice Dickson, Reference Re: Language Rights under the Manitoba Act, 1870 (1985) 19 D.L.R. (4th) 1 at 29-30.

[167] Ibid at 33.

judicially declared unconstitutionality for failure to comply with section 23 of the Manitoba Act.[168]

While there are no cases addressing this point, it seems certain that Government could invoke the doctrine of state necessity as a means of justifying what would otherwise be an illegal disregard of its obligation to perform contractual undertakings or pay court-ordered damages in lieu thereof. Although successful invocation of the doctrine would be contingent on the existence of a "public emergency," it is nonetheless a powerful, final-answer defense which belies the analogical premise.

c. The State cannot act outside of a statute which limits its contractual powers

Where a contract is statutorily governed, the mandatory requisites of that statute must be met or the contract does not come into existence.[169] As the Australian High Court puts it:

> When the administration of particular functions of government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the statute contemplates.[170]

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[168] Section 23 required Manitoba's laws to be enacted, printed and published in both French and English and this successive Manitoba legislatures had failed to do.

[169] Verrault, supra note 6 at 46-47 and CAE Industries Ltd., supra note 6 at 371.

[170] State of New South Wales v. Bardolph (1934) 52 C.L.R. 455 at 496 (Aus.H.C.), quoted with approval in CAE Industries Ltd., ibid at 371 and by the Privy Council in Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk [1975] A.C. 520, per Lord Wilberforce.

If mandatory statutory conditions to a contract are not met the individual is left without remedy--even if he or she were ignorant of the limitations[171]--unless there are the grounds to invoke a remedy based in restitution.[172] The general principle constitutes a defense which can work hardship to the individual.

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[171] The Supreme Court of Canada in The Queen v. Woodburn (1898) 29 S.C.R. 112 at 123 held:

> It is perfectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power, it is notice to all the world.

It is of course true that parties to a purely private contract must also comply with all applicable statutory and common law requirements necessary to the creation of a contract. To this extent, the individual-State analogy holds. But the State contract is generally more heavily regulated because, in the modern Canadian State, there is a "separation of ownership from control and power, which is characterized by the development of bureaucracies."[173] As bureaucratic control and power constitute such a large part of the State, regulatory supervision is required to ensure compliance with the requirements of governmental accountability. And to the extent that statutory compliance is not seen, the individual is left vulnerable.

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[172] Courts have held that where a contract fails for statutory non-compliance, the individual is entitled to a quantum meruit. See May v. R. (1913) 14 Ex. C.R. 341 at 346; National Dock and Dredging Corpn v. The King [1929] Ex.C.R. 40 at 54 (where there is no contract but the Crown accepts the plaintiff's work, quantum meruit applies). See too Walsh Advertising Co. Ltd. v. The Queen [1962] Ex.C.R. 115 where the Crown was ordered to pay a quantum meruit for adopting some of the results of the plaintiff's service even though the contract itself failed for non-compliance with mandatory statutory provisions, at 130. Finally, see The Gresham Blank Book Company v. The King (1912) 14 Ex.C.R. 236 at 238. The plaintiffs in these cases would not, of course, be entitled to any compensation for expectation interest or loss of opportunity.

Note that in City of Moncton v. H.E. Carson & Sons Ltd. (1982) 138 D.L.R. (3d) 596 (N.B.C.A.), the respondent supplied goods and services to the City of Moncton on request of the City's engineer. The City refused to pay the account because the alleged contract did not meet statutorily mandatory conditions, including having the signature of the mayor and clerk. In its action on the contract, the respondent was unsuccessful due to statutory non-compliance, at 603. It appears, however, that no claim for a quantum meruit was made. See too Silver's Garage Ltd. v. Town of Bridgewater (1970) 17 D.L.R. (3d) 1 (S.C.C.), referred to with approval in City of Moncton. In Silver's Garage Ltd., the Supreme Court of Canada determined that, due to statutory non-compliance, the municipality had no liability to pay the price of snow-blowing equipment which it had used repeatedly during the winter. Note again that a claim in quantum meruit was apparently not raised. As the Court stated, at 12:

> If the appellant had brought action on the basis that the town was under an obligation to pay on a rental basis or if it had sued for damages done to the equipment by wear and tear...different considerations might have applied.

Where the contract fails for statutory non-compliance, a remedy in unjust enrichment may be possible if the plaintiff can bring itself within the test articulated by Mr. Justice Dickson in Pettkus v. Becker [1978] 2 S.C.R. 436 at 455: there must be an enrichment, a corresponding deprivation, and an "absence of any juristic reason--such as a contract or disposition of law--for the enrichment."

In Lake Champlain and St. Lawrence Ship Canal Co. v. The King,[174] for example, the plaintiff spent a considerable sum of money in reliance on a grant to be awarded to it pursuant to a special Act passed for this very purpose. This Act provided that the plaintiff's plans for the construction and operation of a canal were to be submitted for approval by the Governor-in-Council prior to commencement of construction. The Governor-in-Council refused its approval, not because of problems with the plans submitted, but because the government had, between the passing of the legislation and the submitting of the plans, decided against the necessity for building a canal. Accordingly, it declined to give its consent on "the high political grounds of public policy."[175] Notwithstanding a strong dissent by the Chief

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[173] Cohen, supra note 14 at 392.

[174] (1919) 54 S.C.R. 461.

[175] Ibid at 473.

Justice,[176] the majority found that no contract came into existence because the statutorily mandatory approval was not obtained.

d. The fact of legislative power

The State has unequivocal control over the outcome of a contractual dispute through exercise of its legislative powers. Hence, if legislation is passed making it an "imperative duty of the Government" to terminate a contractual agreement, "the Crown...[incurs] no liability...by performing that statutory duty."[177] Similarly, if legislation creating a public office is repealed, then the officer holder no longer has a contract to sue on and thus is without remedy even when terminated without cause, without notice, and without payment in lieu.[178]

Further, the State is competent to overturn a judicial decision by simply passing a law to the contrary. Such legislation--subject to its constitutional validity--

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[176] As the Chief Justice notes, ibid at 467:

> That the claim is a meritorious one, seems clear. It would surely be an injustice if the suppliants after incurring large expenditures on the faith of a Parliamentary grant were to be deprived of all their rights not through any defect in their plans but because the Government did not approve of the undertaking and dissenting from the decision of Parliament could by withholding approval of the plans prevent altogether the carrying out of the works.

[177] Windsor & Annapolis Rwy. Co. v. The Queen, supra note 5 at 616. Note that in this case, the court found that legislation invoked by the Crown as authority for terminating the contract at issue had no such effect.

[178] In Wicks v. A.G of B.C. [1975] 4 W.W.R. 283 (B.C.S.C.) the plaintiff's statutory position was repealed by an Act of the British Columbia legislature. When the plaintiff brought an action for breach of contract against the government, his action was dismissed on the theory that, upon repeal of the statutory position, the contract of employment no longer existed. Accordingly, there was nothing to left to sue on. The Court found that the plaintiff's only hope was for an ex gratia payment, at 289.

thereby has the effect of removing all legal consequences of governmental liability. As Zelleck asserts:

> The Government has a truly wonderful magic wand....When it is waved with the incantation "Parliamentary Sovereignty," a great and mysterious and sometimes terrible thing called an Act of Parliament is brought into being which can turn right into wrong, justice into injustice and subvert the rule of law.[179]

Zelleck cites several examples, though none involving a State contract, wherein the British government passed legislation to overturn the effect of a judicial decision:

> Probably the best known example of [this kind of] retrospective legislation...denying a successful litigant the redress to which he [or she] had been entitled was the War Damage Act 1965, which deprived the Burma Oil Company of the compensation awarded to it by the House of Lords in respect of the destruction of its installations in Burma during the second world war so that they would not fall into the hands of the advancing Japanese forces.[180]

A similar strategy has been employed in Canada. In 1948, for example, the Ontario High Court issued an injunction against a pulp and paper mill company restraining it from further polluting the Spanish River in the District of Sudbury.[181] This injunction was subsequently vacated by the Ontario Court of Appeal[182] but restored by the Supreme Court of Canada.[183] Not content with this final judicial outcome, the Ontario legislature passed the KVP Company Limited Act, 1950[184] which provided, inter alia, that:

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[179] Graham Zelleck, supra note 164 at 288.

[180] Ibid at 290.

[181] McKie v. K.V.P. Co. [1949] 3 D.L.R. 201 (Ont. H.C.).

[182] [1949] 1 D.L.R. 39 (Ont.C.A.).

[183] [1949] S.C.R. 698.

> Whether or not its operation is now stayed, every injunction heretofore granted against The KVP Company Limited, herein called "The Company," restraining the Company from polluting the waters of the Spanish River, is dissolved.[185]

While it cannot be said that use of a legislative strategy to avoid judicial pronouncements is frequent, or utterly immune from attack,[186] it is a powerful weapon in the hands of the State alone. It means that, at the end of the day, Government is only bound by a contract if it wants to be. Indeed, the fact of the State's legislative power reduces the resonance in the judicial pronouncement that

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[184] (1950) S.O., c. 33, s. 1 (1).

[185] For an historical account of the legislative and judicial history of this case, see Bruce Elman and John Law, Case Materials for Law 300 (Faculty of Law, University of Alberta, 1990) [unpublished] at 46-55.

[186] It may be the case that where the State acts unlawfully to deprive an individual of his or her rights, legislation purporting to shelter the government would not be applied by the Court.

In the Alberta decision of Chinook Farms Ltd. v. Alberta Government (1986) 48 Alta. L.R. 337 (Q.B.), for example, the corporate plaintiff sought an injunction against the government to restrain it from continuing to flood its farmland. The Crown argued that section 17 of the Proceedings Against The Crown Act R.S.A 1980 c. P-18 prevented the court from granting an injunction against the Crown. Certainly, this is what the words of the Act would imply. Notwithstanding, MacLean J. rejected the argument, at 338, on the following basis:

> The Crown and its officers and ministers cannot shield themselves under s. 17 of the Proceedings Against the Crown Act in matters where they have acted in an unlawful manner which results in depriving an individual of his [or her] rights.

It may be the case that similar reasoning would apply where the State passes legislation excusing itself from liability for a contractual breach. But as such an argument conflicts with the concepts of parliamentary sovereignty, it is by no means clear that the argument would be successful.

"it is the duty of the Crown and of very branch of the executive to abide by and obey the law."[187] At the very most, it is an admonition.

III. THE MODEL'S SUCCESS

We have seen that the underlying object in applying the private law model to the State contract is protection of the individual from overarching State power. The model's underlying assumption is the presence of a private analogue. My conclusion is that the model cannot justify its assumption and so cannot attain its object. Indeed, deference to the private law model of State liability prevents the development of a Canadian public law which is consistent with liberal democratic theory. On the one hand, the model distorts critical components in the State contract. It refuses to recognize ongoing obligations arising from the antecedent individual-State and State-society relationships because the model locates all obligations in the moment of acceptance. It misconstrues the imbalance of power between the individual and State because it recognizes only exaggerated forms of inequality. It accords little formal recognition to the State's duties of governance because what the model looks for is "freedom of contract" tested only against the standard of uncoerced consent. It cannot account for a self-interested bureaucracy. It fails to recognize the significance of special State defenses and so cannot comprehend that contracts never fully bind the State.

On the other hand, when public law principles are confronted by the court because they are inescapable, the result is unsystematic and dissipative. They are seen as exceptions which prove the rule rather than as evidence of an independent area of law requiring disciplined attention. As a direct consequence, there is still no definitive judicial position on whether the executive owes a duty of fairness in all its contractual dealings. There is still no consistent attempt to develop content to the meaning of that duty. There is insufficient attention paid to when and why the State can legitimately invoke prerogatives as well as to the consequences of prerogatives on individual rights. There is no sustained attempt to enforce the State's rights and obligations without making the individual unreasonably vulnerable and vice versa.

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[187] Per Sir George Farwell, The Eastern Trust Company, supra note 3 at 759.

The contradiction generated by this private law strategy is significant. In seeking to respect and protect individual autonomy, our public law system claims to be, for the most part, a private law system. In accord with Dicey, everyone therefore is "subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."[188] But a private law strategy produces a public law system in spite of itself and one which--because it is unknowing--is not equipped to do its job. It generates uncertainty because its sources of law are both numerous and unstructured. Because it has no plan, it cannot develop "general principles and legal categories...which attempt to take account of the inherent differences of position between public authorities and private individuals."[189] For the same reason, it is unable to generate a rational "synthesis of public law by relating judgements to principles derived from a coherent and evolving philosophy."[190] As a result, our

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[188] Dicey, supra note 13 at 189.

[189] Dyson, supra note 30 at 233.

[190] Ibid.

"public law" system heightens the vulnerability of the individual instead of reducing it--an ironic and counter-productive result.

Given the impoverished conclusions to which the private model leads, it becomes critical to explore alternatives. Of assistance would be a model of Canadian public law which acknowledges the differences between individual and State[191] and seeks to accommodate those differences within the context of liberal democratic theory, the Rule of Law and other Canadian constitutional imperatives. What is required is a model which recognizes itself as such. Accordingly, in the next Chapter, I propose to analyze the public qualities and relational values which are at the centre of the State contract. It then will become possible to argue for a model of liability which recognizes its own political implications and so the essential role of theory.

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[191] Accord Cohen, supra note 14 at 38 and the Law Reform Commission of Canada, supra note 15 at 26-27 and 59-60.

CHAPTER THREE:
TOWARDS A CANADIAN PUBLIC LAW

INTRODUCTION

In the last Chapter I endeavoured to show that the private law model fails to account for pivotal constituents in the State contract because it does not recognize the State's status as governor in the market-place. By submerging recognition of the State's duties of governance as well as its coercive resources, the model is able to conclude that the individual and State share a largely equivalent freedom of contract and equality of bargaining. This conclusion, in turn, is both inaccurate and contrary to the idea of the Canadian State. It is inaccurate because the State contract is not, as we have seen, governed by private law alone but by a growing and unstructured mix of constitutional, administrative, and contract law principles as well as by the incidents of sovereignty found in the State's legislative, common law and prerogative powers. It conflicts with the idea of the Canadian State because legal uncertainty[1] is contrary to the Rule of Law. It also conflicts because, in denying the overarching priority of State powers and obligations, it heightens individual vulnerability.

Further, the model is incompatible with the idea of the Canadian State because it implies that the State is entitled to do whatever it can get away with by contract. But, as we have seen in Chapter One, the State is bound to a normative ordering in all that it does: it cannot act in a manner which is inconsistent with or jeopardizes its liberal democratic obligations to the individual and society.[2] Yet, the private law model regards the State as if it were an individual and so acknowledges no antecedent relationships requiring preservation, no unique coercive resources in need of control, no specialized normative ordering governing both.

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[1] Accord R.P. Faulkner who argues, in reference to British and New Zealand law, that there is a "general legal uncertainty surrounding Crown contracts which is to a large degree attributable to uncertainty as to just what the law at present is. This uncertainty, in my view, is caused by an as yet unresolved conflict in judicial attitudes where public and private law meet." See "The Contractual Powers and Liabilities of the Crown and State Participation in Petroleum Development" (1984-85) 14-15 Victoria University of Wellington 75 at 75.

Further, because the private law model submerges the State's identity, it cannot recognize the competing interests in the State contract nor systematically priorize them. This is a serious deficiency as there are at least three sets of conflicting interests which require legal resolution: that of the individual contractor who has undertaken to the State to provide goods or services, that of society for whose benefit the contract was entered, and that of the officials who act on behalf of the State in the contractual process.[3] These interests potentially collide at all moments in the relation--from formation of the contract, to performance, to its termination.[4]

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[2] John Whyte views the matter from a similar perspective. He argues that public administration and normative order are "coextensive and they are so because of the abiding force of legalism in our political culture." See "Normative Order in the Administrative State," (1990) 40 University of Toronto Law Review 491 at 494. Later, he identifies legalism as the handmaiden of liberalism, at 497.

We have seen in Chapter Two that the common law priorizes these interests by sanctioning self-promoting bureaucratic conduct[5] but has no consistent strategy for reconciling public and private collisions. At times, the private interest is elevated. In the 1988 decision of Somerville Belkin Industries Limited v. Government of Manitoba,[6] for example, a newly elected Manitoba government sought to renege on its predecessor's $819,000 grant commitment to the plaintiff--a business which had been a going concern for some time--because it was their view that the new government:

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[3] Theoretically, the bureaucrat's interest should be exactly coextensive with the State's interest but in practise, this is not always the case. As David Cohen points out, it may be dangerous to assume that the bureaucracy is a "benign entity simply fulfilling the wishes of its political or command masters." See "Thinking about the State: Law Reform and the Crown in Canada" (1987) Osgoode Hall Law Journal 379 at 398. See too William Bishop, "A Theory of Administrative Law" (1990) 29 Journal of Legal Studies" 489 at 501:

> The bureaucrat, often lacking any sharply defined or measurable goals, will make at least some decisions in his [sic] own interest, rather than in the interest of the public, as defined by law, that he has been hired to serve.

[4] Whether the conflict actually destroys the contractual relationship is not the issue here. That is a question of the extent to which, among other matters, the parties respect the common contract norms upon which the contract is founded. See Macneil's account, discussed infra at 131-133.

[5] See my discussion of the doctrine of good faith and the rule against self-dealing, supra Chapter Two at 63, footnote 36. The objective of protecting the individual from unfair bureaucratic decisions is at the heart of cases finding that a duty of fairness is owed by the State in the context of tendering. See Thomas C. Assaly Corp. v. Canada (1990) 34 F.T.R. 156 (T.D.) and The Glenview Corp. v. Canada (Min. of Public Works) (1990) 34 F.T.R. 292 (T.D.). See too my discussion of these cases, supra Chapter Two at 75-78.

[6] [1988] 3 W.W.R. 523 (Man. C.A.).

> had received a clear electoral mandate for a more formal relationship between government and business and that mandate precluded proceeding with development assistance grants to established business of the sort that have [sic] been approved on occasion by the previous government...[It] had both a political and moral responsibility not to approve the grant."[7]

Accordingly, the government sought to raise the procedural defense that the grant was unsupported by an Order-in-Council and so was not binding. Notwithstanding the public interest matters at stake, the Chief Justice summarily found against the government:

> Somerville Belkin was treated badly and treatment of this kind should not be tolerated. There was a valid and enforceable commitment by the government to Somerville Belkin and it was much to late to renege on it.[8]

At other times, however, the collective interest is elevated. For example, at common law, the State is only entitled to exercise its power to contract in the public interest, not in the interest of specific individuals.[9] Similarly, the public interest forbids the State from fettering its legislative sovereignty.[10] This same interest is reflected in the standard form federal procurement contracts which provide for termination or reduction of the contract's quantity or scope at the convenience of the State with only a measure of compensation for the individual.[11]

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[7] Taken from a written summary of the discussion between the plaintiff and the new Minister of Economic Development and Tourism regarding the grant cancellation, quoted in the judgment, ibid at 526.

[8] Ibid at 528.

[9] There are some exceptions to this principle such as when the State enters into contracts as a guardian of a specific minor. But even then, the provision of necessities to children is also in the public interest.

[10] See my discussion of these contractual constraints, supra Chapter Two at 74.

Conflicts in the State contract between public and private interests are the predictable outcome of liberal political theory. Indeed, "the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it."[12] Put in other terms, there is a "contradiction between individual choice and collective control."[13] Some scholars, such as Allan Hutchinson, have therefore concluded that the public and private interests are incapable of resolution because they are "antithetical concepts that defy compromise or mediation."[14] If this is the case, the private law model cannot be improved upon because no conception of State liability will succeed in reconciling the public-private tension.

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[11] See Supply and Services Canada Short Form DSS MAS 9329 (General Conditions for the purchase of commercially available off the shelf goods and services). On termination, the contractor is only entitled to actual costs:

> reasonably and properly incurred...but in no case shall such reimbursement exceed the Contract price or shall the Contractor have claim for damages, compensation, loss of profit or otherwise, excepts as herein provided.

Termination for convenience clauses are also present in other standard form federal government contracts including General Conditions, United States Purchases 1011A and General Conditions, Long Form DSS-MAS 9329-1.

[12] Duncan Kennedy, "The Stages of the Decline of the Public Private Distinction," (1982) 130 University of Pennsylvania Law Review 1349 at 1349.

[13] Hutchinson, "Rise and Ruse of Administrative Law and Scholarship" in Allan Hutchinson (ed.) Dwelling on the Threshold: Critical Essays on Modern Legal Thought (Toronto: Carswell Company Limited, 1988) 85 at 88.

[14] Ibid at 91.

It is true that Hutchinson's claim has a theoretical purity or consistency--it attacks liberal political theory at its foundation--but it is largely an ideological objection which I do not propose to address here. Within the context of a liberal democratic society, compromises between public and private are made all the time on the assumption that the status quo is not inherently flawed, that conflict can be resolved on the basis of principled rationality, and that pursuit of this kind of resolution is a worthwhile human endeavour.[15] While, for example, it is incontestable that the individual's "right" under classical liberalism to compete openly in the market-place cannot fully co-exist with the collective's "right" not to be held ransom by a monopolist, and the "right" of other individuals to utilize their own labour,[16] an uneasy resolution can and often is worked out. And when we recognize that the State's solution to this collision of rights--such as combines legislation--normally partakes of both private and public values, we encounter direct evidence that future collisions between public and private can also be resolved.[17]

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[15] See my discussion of this, supra Chapter One at 42-43.

[16] See Michael Trebilcock's account of these competing rights as well as his comment that modern liberalism provided impetus to competition policy throughout the United States, Canada, Australia, New Zealand, and Great Britain based on a fairness or equity principle. See The Common Law Restraint of Trade (Toronto: Carswell, 1986) 1-29 and at 31.

[17] Even Allan Hutchinson recognizes the need for private autonomy and so the requirement of seeking to reconcile the public and private through compromise. As H. Wade MacLauchlan notes in "Reimagining the State" (1990) 40 University of Toronto Law Journal 405 at 408, footnote 11:

> With a footnote reference to Jennifer Nedelsky...Hutchinson concedes that there were will be moments and activities when individuals should have devolved to them full power and authority to 'establish a space in which they can be immune from collective interference.'

The private law model, however, has proven itself unable to provide the required resolution between public and private because, by its very structure, it can neither acknowledge nor address the public-private tension in the State contract. This deficiency--a consequence of the strategy not to recognize the status of the State as governor when it is in the market-place--makes the model ill-suited to its task and argues for a new starting point.

In this Chapter, therefore, I will propose and defend a public law model of liability which priorizes the public interest, recognizes the State's ongoing status as governor, holds Government accountable to a normative ordering derived from the idea of the Canadian State, and generates rules which determine what can and cannot be done in furtherance of the public good. This proposal requires the prefatory step of establishing the public-private distinction as the basis of the model.[18] Once this is accomplished, I will identify, in the second section, certain of the values which make up a normative ordering binding upon the State. In the third section, I will offer some general rules, derived from these values, which would guide the formation of State contracts as well as contribute to the resolution of contractual disputes between individual and State. The fourth section offers some conclusions.

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[18] If we acknowledge that the State is subject to a special normative ordering due to liberal democratic demands, then we must argue that a line--albeit fluctuating and tentative--can be drawn between the public and private. See John Whyte's discussion on this point, supra note 2 at 495. He argues "for the virtue of the existence of such a line and the virtue of engaging in the search for it," at 495.

I. THE PUBLIC-PRIVATE DISTINCTION

The current intellectual climate regards the public-private distinction with some hostility because, in part, it is associated with liberal democratic theory:[19]

> In varying degrees liberals emphasize individual choice and freedom from external control and this leads to a concern to strike a proper balance between the private sphere in which the individual is allowed to pursue his (sic) own ends in his own way and the public sphere in which his freedom is subject to restriction for the benefit or protection of the freedom and welfare of others.[20]

Liberal political theory regards the public realm as political and governmental. The private realm, by way of contrast, includes not just hearth and home, not just family--it includes the market-place as well.[21] Classification of an activity as private makes it less subject to judicial scrutiny and State regulation.[22]

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[19] The relationship between liberalism and the public-private distinction is observed by, among others: Peter Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in John Eekelaar and John Bell (eds.) Oxford Essays in Jurisprudence (3rd series) (Oxford: Clarendon Press, 1987) 57 at 57; Catharine MacKinnon, "Feminism, Marxism, Method, and the State," (1983) 8 Signs 635 at 656-657; Kennedy, supra note 12 at 1349; Robert Mnookin, "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1982) 130 University of Pennsylvania Law Review 1429 at 1429; and Morton Horwitz, "The History of the Public-Private Distinction" (1982) 130 University of Pennsylvania Law Review 1423 at 1423.

I have already commented that liberal theory is currently under sustained attack, supra Chapter One at 45-46 and accompanying notes. It follows that one of its pivotal distinctions would also be seen as vulnerable.

[20] Peter Cane, ibid.

[21] Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall Law Journal 485 at 487-488. See too Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 University of Toronto Law Journal 278 at 285.

[22] It is interesting to note that classically oriented liberals such as Dicey deny the integrity of the public-private distinction in order to render everything as "private" as

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The public-private distinction has been challenged from a number of related perspectives.[23] Ideologically, the distinction has been identified as erecting false barriers against the achievement of substantive equality by women;[24] for advancing the interests of private property owners;[25] as perpetrating "a formal fraud,"[26] and as replicating "the hidden message...that the state stands outside civil society and is not implicated in the hierarchial outcomes of private interaction."[27] Epistemologically, it has been criticized for denying the interconnection between the public and private worlds;[28] for inhibiting the "full development and expression of personality," by splitting the "modern personality into public and private selves;"[29]

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[22] (...continued) possible and so less amenable to State intervention. As Cohen notes, Dicey was "consumed with 'legality,' with the control of 'collectivist' legislation notwithstanding its source in majoritarian values of even a limited democracy." See Cohen, supra note 3 at 390.

[23] See Crane's classification of the attacks into three categories: descriptive, prescriptive, and technical, supra note 19 at 60-71.

[24] Fudge, supra note 21 at 488.

[25] Hutchinson and Petter, supra note 21 at 286, referring to Morton Horwitz, supra note 19.

[26] Hutchinson and Petter, ibid.

[27] Duncan Kennedy, supra note 12 at 215.

[28] Fudge, supra note 21 at 485, quoting the following passage from Virginia Woolf's To the Lighthouse: "The public and private worlds are inseparably connected...The tyrannies and servilities of the one are the tyrannies and servilities of the other."

[29] Andrea Asaro, "The Public/Private Distinction in American Liberal Thought: Unger's Critique and Synthesis" (1983) 28 American Journal of Jurisprudence 118 at 125-126.

for hiding the revelation that "we cannot know nor control the boundary between self and other."[30]

This Chapter will not assess the epistemological and ideological critique. Indeed, it is considerably beyond the scope of this thesis to consider radical projects for reimagining and reconstituting the Canadian State. My objective here is to propose a model of State liability which would be more faithfully liberal, more in keeping with the existing idea of the Canadian State. Within this context, therefore, the epistemological and ideological perspective is assumed; what must be demonstrated is that the distinction itself makes sense within Canadian liberal democratic culture. For if the distinction cannot be defended, then a model premised on the distinction cannot succeed either.

Some legal scholars maintain that the public-private distinction is irretrievable because it is unmodern, unsophisticated, and has no real descriptive foundation. The distinction has been criticized, therefore, as manifesting a "crude bifurcation,"[31] as being "anachronistic and inaccurate" given the growth of the "mixed economy and so-called "corporate state""[32] as being "old-fashioned and undesirable on principle"[33] and as manifesting a "wholly arbitrary" division.[34] Hutchinson persuasively argues, for example, that given the striking similarities between public and private power--particularly the private power of corporations--there should be a "greater appreciation... of...their shared potential for abuse."[35] He therefore asserts that corporations be subject to a scrutiny parallel to that of the State because they have so much control over the lives of others.[36] And we may agree that our understanding of what constitutes "public" is too narrow. Conceding this point, however, does not threaten the integrity of the distinction itself;[37] it merely implies the need for reclassification within that distinctional structure. Nor would it imply that matters which continue to be regarded as "private" are therefore immune "to any and all judicial or governmental control or regulation."[38] Indeed, the principle of Parliamentary sovereignty means that the State is always competent to regulate. Antecedent classifications are not fully determinative.

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[30] Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale Law Journal 999 at 1113.

[31] Allan Hutchinson, "Mice under a Chair: Democracy, Courts, and the Administrative State" (1990) 40 University of Toronto Law Journal 374 at 377.

[32] Cane's summary of the critique, supra note 19 at 65.

[33] Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) Modern Law Review 241 at 242. She also points out at 257:

> The structure of the modern state is such that public and private industry, autonomous statutory bodies, regional boards and central

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[33] (...continued)

> government departments all jostle for place. They carry on identical functions which are allocated in a haphazard fashion....no activity is typically governmental in character nor wholly without parallels in private law.

[34] Hutchinson and Petter, supra note 21 at 285.

[35] Supra note 31 at 377.

[36] Ibid.

[37] Cane, supra note 19 at 65.

[38] Gene Anne Smith, "Public Duty and Private Power in Administrative Law" (1990) 40 University of Toronto Law Journal 412 at 413.

Of course, the State is omnipresent--it is complicit "in all forms of social activity"[39]--and on this level, of course, everything is "public." One is nonetheless struck by the enormous qualitative differences between governmental and non-governmental entities. These differences originate in the State's power, authority, and duty to command through legislation and otherwise; they originate in liberal democratic obligations on government to preserve individual autonomy and the common good; they originate in constraints on choices based on principles derived from liberal democratic theory, in negative obligations to refrain from acting and in positive obligations to act. To deny these differences is both unhelpful and counter-intuitive.

I will proceed on the basis that the public-private distinction--a cornerstone of liberal democratic theory and a judicially recognized dichotomy[40]--is worth preserving. It assists in devising improved strategies of rational governance,[41] improved ways of understanding the individual-State relationship, by identifying a range of bounded choices within which the debate is located.[42] Bounded choices allow one to speak about specific matters--instead of everything at once--including how Canadian public law ought to be conceptualized. As Whyte argues:

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[39] Hutchinson, supra note 21 at 290.

[40] The Supreme Court of Canada in Retail, Wholesale and Dept. Store Union No. 580 v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573 expressly recognized the distinction between public and private by holding only activity connected with government up to Charter scrutiny, at 600.

The decision in Dolphin has been subject to considerable academic criticism including: Allan Hutchinson and Andrew Petter, supra note 21; Brian Slattery, "Does Dolphin Deliver?: The Charter's Relevance to Private Litigation" (1987) 32 McGill Law Journal 905; David Beatty "Constitutional Conceits: The Coercive Authority of the Courts" (1987) 37 University of Toronto Law Journal 183.

More recently, the line between government and non-government has been recognized in four Supreme Court of Canada decisions: McKinney v. University of Guelph; Harrison (Connell) v. University of British Columbia; Stoffman v. Vancouver General Hospital; and Douglas/Kwantelen College Faculty Association v. Douglas College (December 6, 1990)(S.C.C.)[unreported]. See Katherine Swinton's case comment, (1991) 2 Constitutional Forum 76-77.

> Governments are immensely powerful and impotent. Corporations are titans and pawns. Associations dominate society and are irrelevant. Individuals--a few, at least--wield tremendous influence; the rest are truly subjects of external authority. The questions what is the state and what is not and what is public and what is private are not salient to the question of power.... Nevertheless, there is everything to be said for the concept of a boundary between that power which must be exercised by prescription and that which need not. There is therefore much to be said for searching for the line between public administration and private authority, because that line defines the territory which is subject to the requirement that action be driven by a normative order.[43]

II. A PUBLIC LAW MODEL AND ITS REQUIREMENTS

1. The model

In light of the deficiencies inherent in the private law model, it is proposed that Canada adopt a public law conception of the State contract. Such a strategy is already employed in several European countries,[44] has components which are favoured, in varying degrees, by the Law Reform Commission of Canada as well as by numerous legal scholars.[45] The public law model I propose elevates collective interests in the State contract over the individual ones;[46] further, it cast contractual performance as both a private obligation and a public service.[47]

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[41] See Jeffrey Blum's discussion of the source of rational governance in "Critical Legal Studies and the Rule of Law" (1990) 38 Buffalo Law Review 59 at 69 and 76-77.

[42] Ibid at 135-138. Accord Geoffrey Samuel, "Public and Private Law: A Private Lawyer's Response" (1983) 43 Modern Law Review 558 at 582 who describes the public-private distinctions as "a useful device for helping analyze and categorize."

[43] Whyte, supra note 2 at 494-495.

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[44] The concept of a "distinctive public law contract" is recognized as a distinct entity in France, Italy, Belgium, certain Latin American countries influenced by France and, to a lesser degree, Germany. See W. Friedmann, Law in a Changing Society (2nd ed.) (New York: Columbia University Press, 1972) at 402.

[45] The Law Reform Commission of Canada, The Legal Status of the Federal Adminstration, (Working Paper No. 40) (Ottawa: Law Reform Commission of Canada, 1985)--in preparation for developing a new legal status for the federal government--calls for administrative law with a "distinctive meaning" at 26-27, and one which would recognize the differences between individual and State, at 59-60; Cohen, supra note 3, notes that "private law doctrine is an inadequate tool to resolve individual-state conflict," at 381; H. Street, Governmental Liability: A Comparative Study (Cambridge: Cambridge University Press, 1953) at 82 argues that Government contracts should to some extent be governed "by different legal rules" and at 185 he suggests that "Anglo-American countries ought to copy the French by subjecting all administrative authorities to a uniform law;" L. Brown and J. Garner, French Administrative Law (3rd ed.) (London: Butterworths, 1983) at 131 note that "the English failure to recognize the need for a special administrative contract has led not only to infelicities and inelegancies, but on occasion results in positive injustice;" Alan Mewett, "The Theory of Government Contracts" (1958) 5 McGill Law Journal 222 at 226 remarks that government contracts have too many unique characteristics to "make a complete assimilation between them and the ordinary contract between private persons....Confusion will inevitably arise if the features of government contracts are explained and applied according to principles and terminology of private law;" and Friedmann, ibid at 407 writes:

> the case for open recognition, and appropriate regulation, of contracts between government and other public authorities on one part, and private individuals on the other is overwhelming.

This starting point may be controversial within the context of Canada's private law tradition opposing any specialized way of regarding the State contract.[48] It also may be controversial when measured against certain strands of liberal thought. I propose to deal with each of these objections in turn.

First, while the private law model purports not to rank public and private interests at all--it treats the State as if it had a private analogue--Chapter Two has shown that the model does not consistently attain this objective. The State's duties of governance, and so its priority, are enforced through its authority only to contract in the public interest as well as in significant "exceptions" to the application of the private law model. These exceptions limit the kinds of contracts into which the State can enter so as to preserve the State's freedom and obligation to act in the public good.[49] Further, terms which definitively elevate the public interest over private ones already exist in standard form Government contracts--the termination for convenience clause and the provision which provides final decision making authority over construction works contracts to a Government engineer are two examples.[50] In fact, it has been observed that State power under a standard form contract coincides with the State's position in France's public law system,[51] a system which places every aspect of the State contract subject to the "the predominance of the public interest."[52] Adoption of a public law model in Canada would not therefore require a radical reformulation of the State contract in practice--only how it is conceptualized. This calls for a formal recognition of the qualified position of primacy which public already has over private, a uniform application of this principle, as well as a systemization of the consequences which flow from that ranking.

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[46] Priority of the public interest is formally recognized in civil law jurisdictions which have a separate legal ordering for administrative contracts. In France, for example, every aspect of the State contract is subordinate to "le but de service publique" or public-interest objectives. See Street's discussion, ibid at 101.

[47] Accord C. Turpin, "Government Contracts: A Study of Methods of Contracting" (1968) 31 Modern Law Review 241 at 241. Turpin also quotes, in footnote 2 at 231, the following observation made in the British House of Commons regarding State contracts:

> I can only conclude that what is needed in this situation is a reappraisal by private industry of its relations with the Government, who [sic] will become an even bigger buyer as the years go by. We need a frank and meaningful acceptance by industry, suppliers and contractors that the public interest is at stake and that the public are footing the bill. They are engaged in a service and not a commercial enterprise in this respect.

See H.C. Deb. Vol. 686, col. 426, per Mr. Houghton, member for Sowerby, December 11, 1963. See too Mewett, supra note 45, describing the position of the individual contractor under French administrative law.

[48] See, for example, the position taken by Peter Hogg in Liability of the Crown (Toronto: The Carswell Company Limited, 1989) at 161 and the Ontario Law Reform Commission, Report on the Liability of the Crown (Toronto: The Ontario Law Reform Commission, 1989) at 42.

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[49] See my discussion, supra Chapter Two at 79-84.

[50] See the standard form federal procurement contract quoted in footnote 11 of this Chapter for the termination clause. See Department of Supply and Services Canada General Conditions, Construction Fixed Price and Unit Prices No. 1934, clause 22, for the engineering clause.

[51] Friedmann points out, supra note 44 at 403, that a good deal of the law of droit administratif [the specialized French law which applies to State contracts] can already be found in standard form government contracts. See too Mewett's assertion, supra note 45 at 238-239 that standard ingredients like the termination clause:

> have the effect of achieving for the government in the common-law system what, under the French system, is already accorded by the law to the administration in a contrat administratif. These clauses are all methods in which the government, as one of the contracting parties, manages to protect the public interest, within the terms of the contract.

[52] Brown and Garner, supra note 45 at 126.

Second, though subordination of private to public is contrary to a classical liberal construction of individual freedom, I have already argued in Chapter One that Canadian liberalism is oriented towards reform and public welfare; it is more tolerant of government intervention.[53] A related point is that the public interest has already been elevated in the Government contract--the State is only entitled to enter into agreements when doing so is in the common good. What is required beyond this is to entitle the State to modify or terminate a contract even absent express contractual authority to do so. Concomitant with priorizing the public interest in this way ought to be the development of public law principles to protect expectations and insure a level of compensation in the event that a State contract is affected because the public interest requires it.

2. The Normative Ordering

The State's most fundamental challenge within a public law model is to secure the public good while at the same time preserving its relationship with the individual contractor. This is so for two reasons. First, independently of questions of governance, the State is required to treat the individual with respect because this is one of the foundations of a liberal democratic society. But furthermore, one of the

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[53] As Hutchinson notes, the Canadian State, in its "more modern guise...allows the government a more active role in establishing the social and political conditions that enable citizens to develop themselves fully and participate extensively in social life." See "Mice under a Chair," supra note 31 at 382. Alan Cairns notes that the Canadian State plays a leadership or "steering" role for society. See "The Past and Future of the Canadian Administrative State," (1990) 40 University of Toronto Law Review 319 at 358.

State's most solemn obligations as governor is preservation of its relationship with the citizenry: power cannot be exercised legitimately absent consensuality between governor and governed. Preservation of the relationship between citizen and State, in turn, requires the latter to anticipate the future consequences of its behaviour as well as to bring its conduct into line with a matrix of social and political values. This matrix constitutes the normative ordering which binds the liberal democratic State whether it is acting in the legislature or in the market-place. As I have argued in previous Chapters, liberal democratic theory recognizes the State's duties of governance and coercive resources in every arena.[54]

A normative ordering is critical to a workable public law conception of the State contract because it delimits what the State can do in the market-place and why. In order to develop prolegomenary content to the normative ordering, therefore, I propose to draw upon Ian Macneil's theory of contract norms. This is a helpful strategy because Macneil's theory accounts for how contractual relationships achieve their object despite the inability of terms and conditions to stake out definitively each party's obligations, to project fully future events.[55] These are norms which, when respected, allow intended exchanges to achieve fruition because they offer a **general** methodology of relationship preservation. They are not specific to contract law alone:[56] indeed, as Macneil "sees exchange occurring almost everywhere, his theory becomes in effect a general theory of social order."[57] By transplanting contract norms into the realm of political theory, one is better able to determine a framework within which the State can participate in the market-place, enter into contracts with its citizenry, and bind itself to future performance, without eroding its legitimacy as governor.

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[54] Whether, in addition, the State's office-holders face the sanction of electoral defeat for disregarding their obligations is a consequentialist concern not at issue here. Indeed, office-holders can ignore liberal democratic constructs and still remain in power but this does not retrieve the acceptability of their conduct.

[55] See Ian Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations (New Haven: Yale University Press, 1980); "Values in Contract: Internal and External" (1983) 78 Northwestern University Law Review 340; "Relational Contract: What We Do and Do Not Know" (1985) Wisconsin Law Review 483. Macneil also discusses his theory in "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" (1978) 72 Northwestern University Law Review 854; "Economic Analysis of (continued...)

3. Macneil's theory

Ian Macneil identifies common contract norms as follows:

> (1)role integrity (requiring consistency, involving internal conflict, and being inherently complex), (2) reciprocity (simply stated as the principles of getting something back for something given), (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the restitution, reliance, and expectation interests (the "linking norms"), (8) creation and restraint of power (the "power norm"), (9) propriety of means and (10) harmonization with the social matrix.[58]

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[55](...continued)
Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus" (1981) 75 Northwestern University Law Review 1018; and "Restatement (Second) of Contracts and Presentiation" (1974) 60 Valparaiso Law Review 589.

[56] As Macneil himself asserts, "The 'contract' theory has carried me to all aspects of political and sovereign life." See "Values in Contract," ibid at 350, footnote 30. See too his comment, at 351, that common contract norms and their interplay "permit the widest possible range of 'successful' human activity and interaction" [footnotes deleted].

[57] William Whitford, "Ian Macneil's Contribution to Contracts Scholarship" (1985) Wisconsin Law Review 545 at 545.

[58] "Values in Contract," supra note 55 at 347 (references deleted).

According to Macneil, these norms figure in all contracts but are more or less pronounced depending on whether the contract in question is discrete (that is, where exchange is relatively instantaneous) or relational (one in which obligations continue over time).[59] This difference, in turn, is derived from the differing--though not inherently opposed--values in the two types of contracts.

Further discussion of Macneil's theory would be superfluous. His development of a highly structured theory--a "rich classificatory apparatus"[60]--accounting for common contract norms, discrete norms, and relational norms as well as values in contractual dealings, is not directly relevant to my project here. Instead, I propose to adopt and modify Macneil's account of relational norms and values[61] in a manner distinct from his goal of "comprehending values in the universe of contract."[62]

4. Constituents of a Compulsory Normative Ordering

My intention in this section is not to offer a comprehensive theory of public norms to which the liberal democratic State must conform. My objective is considerably less expansive: it is to identify the more obvious--and hopefully less controversial-- components of an ordering which, because it encourages preservation of relationships, binds the State in all that it does. The constituents are: (a) reciprocity and solidarity; (b) role integrity; (c) respect for the citizen, propriety of means, and harmonization of conflict.

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[59] Ibid at 346-349. See too, The New Social Contract, supra note 55 at 65.

[60] O.E. Williamson, "Transition-Cost Economics: The Governance of Contractual Relations," (1978) 22 Journal of Law and Economics 223 at 236.

[61] Accordingly, when I refer to Macneil's work within the context of liberal democratic theory, it must be remembered that Macneil himself is only discussing contracts, not the individual-State relationship.

[62] "Values in Contract," supra note 55 at 341.

a. Reciprocity and solidarity

Reciprocity, within the context of liberal democratic theory, is the principle of interchange between the State and individual, between the governor and the governed. It implies bilaterality, the idea of give and take, of "getting something back for something given,"[63] of fulfilment by the State of its electoral mandate and the giving of citizen fidelity in return. It requires that State officials meet with utmost good faith their obligations in exchange for being elected or appointed to positions of power to which these conditions of performance are necessarily attached. Reciprocity is both a goal of the individual-State relationship and a value within it.

Solidarity is the "belief in being able to depend on another"[64] and so "permits the projection of reciprocity through time."[65] It facilitates preservation both of the particular relationship and the preservation of the larger, collective relationship.[66] Solidarity is the product of citizen trust in the workings of government; of citizen expectation that the State would not advance its projects through sharp practise or other forms of advantage-taking behaviour; of the conviction that, in all its dealing, the State would act fairly and in good faith. The presence of solidarity, from the perspective of State theory, means that State, society, and individual have recognized at least a limited intertwining of their fates and have accepted being part of a shared socio-political enterprise.[67]

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[63] Ibid at 348.

[64] Ibid at 349.

[65] Ibid. Note that in Macneil's account of the relational contract, preservation of the relation is a key objective. This objective is achieved by "an intensification and expansion of the norm of contractual solidarity." See The New Social Contract, supra note 55 at 66. See too "Values in Contract" ibid at 362. Accordingly, my ordering of Macneil's relational norms is slightly different: I am identifying a key objective of liberal democratic theory as preservation of the individual-State relationship. I then adopt from Macneil's theory those relational norms which, in my judgment, most contribute to relationship preservation. This includes calling upon solidarity as a means to preservation as opposed to representing the preservational objective itself.

[66] The New Social Contract, ibid at 66.

b. Role integrity

Role integrity requires consistency[68] from the State in all its dealings. Achieving integrity does not mean that the State must manifest itself identically in every arena. This would be both impossible and undesirable.[69] What it does imply, however, is a measure of continuance between the State's present and future self; it argues for a minimum level of unity in the State's perspectives, attitudes, obligations and conduct, for an integration of State roles. This liberal democratic norm requires the State to avoid self-contradiction and to submit to a generalized modulation of all its behaviour, whether legislative, administrative, or executive.

Role integrity constrains the State by denying the possibility of a fragmented identity. This means, among other things, that the State cannot be a cut-throat competitor at one moment and an instrument which delivers social benefits at the next--it must reconcile its activities by striving for an even pitch. Accordingly, fulfilment of this norm is no easy task. It requires "more than simply keeping the role honest;...maintaining its integrity in the sense of keeping it together in a coherent piece is a major job of social engineering."[70]

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[67] The presence of solidarity need not be demonstrated by fierce patriotism. It is enough--given liberal acceptance of multiple visions of the good life--that people accept the boundaries emanating from the State idea, and value the fostering of justice in the community. See my discussion on Dworkin, supra Chapter One at 46-47.

[68] "Values in Contract," supra note 55 at 347.

[69] Macneil points out that total rigidity would act against relationship preservation and so is not desirable. See ibid at 363.

c. Respect for the citizen, propriety of means, and harmonization of conflict[71]

The State must interact with the individual in a manner which demonstrates respect for the individual because liberal democratic theory demands no less. This requirement places constraints on how the State--through its officials--can achieve its objectives. As Macneil points out: "every social relation generates norms concerning the ways by which ends may be achieved and the ways by which ends, no matter how legitimate may not."[72] Within the individual-State context, regard for the individual forbids arbitrary conduct since that frustrates expectations in a manner contrary to the Rule of Law.[73] It forbids conduct which is needlessly inconsistent or unfair. It requires the State earnestly to consider the consequences of its actions and their potentially coercive impact. It requires procedural regularization so as to maintain the "good faith and trust"[74] which is present in a relationship founded on reciprocity and solidarity.[75]

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[70] Macneil, The New Social Contract, supra note 55 at 66.

[71] "Values in Contract," supra note 55 at 362

[72] Ibid (references deleted).

[73] See my discussion in Chapter One, supra at 26-29.

[74] The New Social Contract, supra note 55 at 68.

[75] The level of procedural regularity required depends on the level of solidarity and reciprocity existing in the subject relationship, ibid.

Respect for the individual requires the State to restrain its coercive resources and power. The State object, in the event of conflict with the individual, is not domination but reconciliation. It is the State's duty to harmonize the dispute,[76] to look for consensus, and locate a solution consistent with it obligations to society, its duty to respect the rights of the individual, and the dictates of fairness.

d. Conclusion

The foregoing is offered as an initial framework within which the individual-State relationship achieves continuance. It provides the basis for mitigation of State power in all circumstances by locating acceptable State conduct within the context of relationship preserving norms. Through this ordering, the State and what it does are taken as one piece; form and practise strive for consistency; unity between idea and institution--the two components of the Canadian State discussed in Chapter One--becomes more achievable.

III. PUBLIC LAW RULES DERIVED FROM THE STATE'S NORMATIVE ORDERING

1. Introduction

A normative ordering, an informal constitution, between the governor and governed is not enough to meet the standard set by the idea of the Canadian State. This is because the latter is partially grounded in the Rule of Law which, in Chapter One, I attempted to relocate within an instrumental and Wittgensteinian conception of rules.[77] Rules--the product of legalism[78]--constitute a Canadian public value because:

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[76] "Values in Contract," supra note 55 at 362.

> Constraint on power through legalism purchases a bundle of social goods. These are a genuine democracy; a placing of an actual self at the point of the exercise of the coercive authority of the state; a process for the reflective exercise of power, and for better knowledge in the citizen and the community about the forces of the world that impact on her and it; a sense of what change can produce and how to make that change; and the possibility of personal engagement in at least some of the decisions that affect life. [79]

Accordingly, the idea of the Canadian State requires a methodology of enforcement, a way of deciding whether or not the State has respected its normative order in its contractual dealings. As Whyte comments:

> There must therefore be some criteria for recognizing a normative order. The qualities that seem to mark a normative order--the existence, before action, of standards for action, the authoritative status of standards for action, and a degree of specificity in their articulation--are the qualities of legalism.[80]

In the following section, therefore, I will propose certain State contract rules derived from the normative ordering described above, namely reciprocity and solidarity; role integrity; respect for the citizen, propriety of means, and harmonization of conflict. The rules which follow will not be exhaustive but illustrative. They will be offered as "doctrinal regularities,"[81] potential standards which seek to contain State relationships by making them as formal as possible.[82] The rules I will propose are intended to demonstrate that the normative ordering which binds the State can generate a workable public law. Unlike its private counterpart, the public law model begins and ends the State's continuing status as governor. Public law seeks to accommodate competing interests within a liberal democratic context. Together with the normative ordering upon which it is grounded, public law is intended to shield the individual from the extreme consequences of State power and unprincipled bureaucratic decisions; to contribute to the protection of the public interest and individual well-being; and to identify procedural standards by seeking to be constant and rational.

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[77] See supra Chapter One at 35-38.

[78] Whyte, supra note 2 at 496.

[79] Whyte, ibid at 496-497.

[80] Ibid at 495 (references deleted). Whyte references K.I. Winston, "Toward a Liberal Conception of Legislation" in J.R. Pennock and J. Chapman (eds.) Liberal Democracy (Nomos XXV) (New York: New York University Press, 1983) at 313.

[81] See Blum, supra note 41 at 71.

2. Reciprocity and Solidarity

a. reconceptualization of the standard form contract through a risk and benefit sharing strategy

In Chapter Two, I argued that the State generally occupies the superior bargaining position because it is an enormous consumer which conducts much of its business through standard form contracts. Its superiority transforms the State's standard form contract into a contract of adhesion, that is:

> a type of standard contract in which one party has ultimate superiority of bargaining power and the other party has virtually no choice but to adhere to the terms of the stipulator (on the basis of a take-it-or-leave-it transaction)....Lack of choice should be tested not by whether competitors are available in a given transaction, but by whether the adhesive terms vary among the competitors.[83]

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[82] See supra Chapter One at 39.

[83] Sinai Deutch, Unfair Contracts: The Doctrine of Unconscionability (Lexington: D.C. Heath and Company, 1977) at 3.

Contracts of adhesion arise when one party is so emphatically stronger than the other that the contractual terms take on a legislative effect.[84] Hence, while it is strictly true that the terms of the standard form contract are not contained in any Act of Parliament, Street relays an insightful point in the following rhetorical question:

> What is the difference from the viewpoint of a company whose business it is to execute government work between rules with legal effect, and conditions with which they must always comply or else lose all Government contracts?[85]

That the State contract has a legislative quality is not in itself contrary to liberal democratic theory or the normative ordering discussed in the previous section. In fact, it can produce positive effects. For instance, the standard form Government contract can reduce transaction costs, facilitate of the conduct of trade, and render the contractual relationship more certain.[86] On the other hand, the effect of adhesion can also be the securing of terms unreasonably favourable to the State.[87] This effect--often the product of self-interested bureaucratic conduct[88]--threatens the antecedent State-individual relationship because unfairness undermines solidarity and reciprocity.[89]

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[84] Ibid. As the New Jersey Court in Henningsen v. Bloomfield Motors, Inc. asserts, contracts between an individual and the Chrysler Corporation, for example, are

> those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble law rather than a meeting of the minds.

See 32 N.J. 358, 390, 161 A.2d 69, 86 (1960), quoted in Deutch, ibid footnote 13.

[85] Street, supra note 45 at 104. See too discussion in Chapter Two, supra at 94-100. As Friedmann points out, the individual contractor is no more able to depart from standard government conditions "than an individual insurer can modify the standard terms of an insurance contract," supra note 45 at 403. See too Street's additional comment, supra note 45 at 99:

> Although there are no legal restrictions on the contents of British government contracts, the same practical result is achieved because the Government only contracts on the basis of certain fixed standard terms and conditions. If a contractor wishes to contract with it, he [sic] can do so on those terms only; no alterations will be made [references deleted.]

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[86] See my discussion of Trebilcock, supra Chapter Two at 94-95. Murray notes that the federal government will now negotiate supplemental terms and conditions to its standard form contracts:

> But since it is an accommodation, it does have its drawbacks. To say the least, it is a cumbersome process because it involves a lot of unnecessary paperwork. I can assure you we end up with one large pile of papers in most procurements! In many cases, the process of negotiating acceptable supplemental terms can be extremely time consuming and expensive and this is unproductive for both sides.
>
> Finally, the suppliers never know when the accommodation may be withdrawn and this is a major concern.

See Grant Murray, "Contracting with the Government" in The Law Society of Upper Canada Continuing Legal Education Series (Toronto: LSUC, 1986) 2 at 7. He notes too that smaller companies which do not have the resources to negotiate supplemental terms "simply sign the standard terms and take it on faith the government will never pursue a claim for damages," at 8.

[87] As Deutch points out, the standard form contract tends to contain unfair terms in favour of the drafter, supra note 83 at 1.

For a clear example of this phenomenon, see the Province of Alberta's Transportation and Utilities Bridge Engineering Contract which provides in its General Specifications (as at April 1, 1988):

> 1.2.39
>
> The Work shall be at the risk of the Contractor and he shall bear all loss or damage arising from any cause, excepting acts of the Queen's enemies, which may occur to the Work until the Work is accepted by the Engineer.

This clause makes the Contractor responsible for natural disasters and other acts of God. It is draconically in favour of the Government.

[88] See Murray's observation, supra note 86 at 5, that bureaucrats and politicians are reluctant to give up any of the State's superior legal and bargaining position for fear of the political consequences. See too my commentary in footnote 3 of this Chapter, supra at 105.

The dangers of adhesion can be reduced by reconstructing the State contract from a public law perspective. As Turpin notes with respect to Government contracts for specialized construction, repair, maintenance and other work:

> These Government contracts, by means of which many of the community's needs are satisfied, cannot be equated with ordinary commercial contracts, concluded between parties at arm's length and with an exclusive view to immediate or eventual profit for both parties. The contractors to the Government seek profit, but they are also carrying out a public function in supplying the requirements of the state.[90]

This conception of the State contract, by recognizing a non-commercial public function, argues for terms which signify a "commitment to cooperate,"[91] distribute benefit/risk contingencies with the object of providing reasonable profits while limiting costs to the State,[92] formally recognize the State's ongoing duties of governance, and assure the contractor of a measure of compensation in the event that the State contract fails, is altered or terminated.[93] As many principles derived from French public law--droit administratif--have this object, I propose to review some of them now.

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[89] Hogg would disagree entirely with this analysis. From his perspective, criticisms of the standard form contract ignore

> the role of a freely-negotiated or tendered price in evaluating the "fairness" of a government contract. It also ignores the sophistication of most suppliers of government goods and services, and the government's interest in preserving a profitable relationship with the private industries upon which it relies.

See supra note 48 at 161, footnote 9. Hogg's position is not entirely tenable, however. First, the fact that price is freely negotiated does not therefore make the entire arrangement freely chosen. Second, one's sophistication or lack of it in face of dictated terms does not change alter the adhesive quality of dictated terms.

[90] Turpin, supra note 47 at 241. Note that Turpin restricts the public function to more specialized government contract, I would adopt the French perspective and extend his description, at minimum, to all adhesive government contracts.

[91] This is Robert Gordon's phrase in "MacCaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law" (1985) University of Wisconsin Law Review 565 at 569.

French law contemplates public authorities entering into two kinds of contracts: the contrat administratif (the administrative contract) and the contrat prive (the private contract.)[94] Characterization of a contract as being of one kind or the other brings into play separate principles, rules, and procedures--even a separate court or tribunal.

It is the principle of "public service" which largely determines how a contract is classified.[95] A public service, in turn, "is any activity of a public authority aimed at satisfying a public need."[96] Accordingly, while most contracts by public authorities would be contrats administratifs, this is not so if the matter is purely commercial or industrial.[97] However, even a purely commercial or industrial contract made by a public authority constitutes a contrat administratif if it contains advantageous clauses known as clauses exorbitantes.[98] Clauses such as those giving the State a unilateral right to rescind are considered to be clauses exorbitantes because they "confer rights or impose obligations upon the parties quite unlike in their nature those which anyone would freely agree to in the context of civil or commercial law."[99] It is thus within the power of the State to decide whether to subject its commercial matters to the droit administratif by including clauses exorbitantes or not.[100]

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[92] Turpin, supra note 47 at 242.

[93] As discussed in Chapter Two, supra at 105-106, including notes, the contractor is not always assured of compensation in the event that a State contract fails, particulary if the grounds to invoke remedies in unjust enrichment do not exist.

[94] Friedmann, supra note 44 at 398.

[95] Brown and Garner, supra note 45 at 80.

[96] Ibid at 80, quoting Rolland, Precis de droit administratif (10th ed.).

[97] Ibid at 87-88.

If the contract in question is a contrat administratif, its primary organizing principle is that the public interest predominates, "even to the extent of overruling the express terms of the contract."[101] But counter-balancing this priority is the "cardinal" French public law principle that "no one individual should suffer damage in the course of the operation of some public service over and above that which is suffered by the public at large."[102] As Friedmann expresses it:

> The contrat administratif, is, in fact, dominated by the principles of continuity of the public service, from which flows the concept of the relation between authority and contractor as one of cooperation.[103]

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[98] Ibid at 88.

[99] Ibid, quoting Stein, CE 20 October 1950.

[100] Ibid.

[101] Ibid at 126. This means that the State has unilateral powers to "suspend, vary or modify the terms, to transfer it to another party, or to take it over itself" (references deleted). See Friedmann, supra note 44 at 400. Note, however, that exercise of this power is justiciable: the contractor has a right to "question an exercise of la puissance publique [State power] in the modification of a contract. See Brown and Garner, supra note 45 at 130.

[102] Mewett, supra note 45 at 231.

[103] Friedmann, supra note 44 at 401.

French public law has developed doctrines designed to facilitate promotion of the public interest with protection of the contractor's economic interests. Accordingly, it provides much instruction on how the State can enter into contracts for the public good without jeopardizing the reciprocity and solidarity required in the relationship between governor and governed. The doctrine of imprevision, for example, provides that where a contract becomes "uneconomical" for the individual to perform, he or she cannot resile but, at the election of the State, will be required to perform on the basis of an indemnity for extra costs encountered.[104]

The doctrine of imprevision fits with the norm of reciprocity and solidarity discussed earlier in this Chapter because it seeks to share between State and individual the risk that the cost of future performance will dramatically escalate. The objective is to distribute the loss arising from unforeseen cost increases which fall short of frustrating the contract.[105] Imprevision therefore reduces the chances that "a contract to do a useful job for the Government is...turned into a gambling transaction."[106] In so doing, it reinforces the bilaterality of the individual-State relationship and enhances trust between the parties.

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[104] See Mewett, supra note 45 at 231 and Brown and Garner, supra note 45 at 126-127. As Friedmann points out, ibid, indemnity involves an "equitable adjustment of the renumeration contractually agreed upon."

[105] As Brown and Garner point out, ibid at 127, to establish imprevision, the performance of the contract need not have become a physical or legal impossibility. It is enough that there was a bouleversement or economic upsetting of the contract.

The public law doctrine of fait du prince mitigates occasions where the "economic basis of the contract is upset by the act of the adminstration itself"[107] such as where Government issues an order which specially affects the contractor's obligations.[108] When this occurs, the contractor is entitled to an indemnity to compensate for any associated costs. This compensatory doctrine marks a substantial departure from Canadian common law which strictly upholds--but without recompense--the principle that the State cannot be contractually prevented from exercising its statutory powers. This leads, as we have seen in Chapter Two, to results which violate the individual-State relationship because it unfairly and unnecessarily disadvantages the individual contractor. As already discussed, should the State give representations contrary to legislation which governs the contractual relationship, no estoppel can be raised because the contractual terms are statutorily mandated.[109] If the State repeals legislation creating an office, the incumbent office-holder is without remedy because his or her dismissal occurs by operation of law.[110] Should a contract be altered or disallowed as a result of legislation, the individual has no claim, and this again for reasons of parliamentary sovereignty.[111] Yet, as we have seen, under French law, the contractor would be compensated on the basis of a fait du prince or imprevision.[112] These doctrines ameliorate harsh outcomes by treating the disappointed contractor with a measure of good faith and fairness. They thus promote the solidarity and reciprocity of the individual-State

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[106] This was the U.S Federal Court of Claims assessment of a standard form government contract which provided that the Government's estimates in its tender invitations were not guaranteed amounts. As the Court put it, such a clause "does not mean that all considerations of equity and justice are to be disregarded." See Peter Kiewit Sons Co. v. United States 74 F.Supp. 165 (1947)

For a similar analysis, see Chernus v. United States 75 F.Supp. 1018 (1948) and James Julien v. The Town of Elkton 341 F.2d. 205 (1965).

[107] Brown and Garner, supra note 45 at 127.

[108] Mewett, supra note 45 at 232.

[109] See my discussion, in supra Chapter Two at 89-91, of Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Limited (1983) 49 Nfld. & PEIR 181 (Nfld. S.C.T.D.); affd. on other grounds (1985) 56 Nfld. & PEIR 91; affd. (continued...)

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[109](...continued)
on grounds given both at trial and on appeal [1988] 1 S.C.R. 1085. In that case, the State was not estopped from disregarding representations it had made because the contractual relationship in question was governed by statute, at 243.

[110] See my discussion of Wicks v. Attorney General of British Columbia [1975] 4 W.W.R. 283 (B.C.S.C.), supra Chapter Two at 108, including notes. In that case, the plaintiff's statutory position was repealed. His action for breach of contract was dismissed because, upon repeal of his statutory position, the contract of employment no longer existed and so nothing remained upon which to sue. For a virtually identical case, see Reilly v. Regem [1934] A.C. 176 (P.C) and Mewett's commentary thereon, supra note 45 at 242-243.

[111] See my discussion of these principles in supra Chapter Two at . In sum, pursuant to British and Canadian law, "the Crown...[incurs] no liability...by performing...[its] statutory duty" per Windsor Annapolis Rwy. Co. v. The Queen (1886) 11 A.C. 607 at 616 (P.C.).

[112] As Brown and Garner note, supra note 45 at 128:

> where an administrative agency which is a party to the contract takes some measure by virtue of la puissance publique that affects the substance of the contract, the contractor will normally be entitled to an indemnity.

Brown notes that the doctrine of fait du prince would provide compensation to an individual who had relied on a government representation to his or her detriment and would also compensate a party to a contract in which the State had wrongly fettered its statutory duties, at 127-128.

relationship by making the State fiscally responsible for the impact of its legislative status in the market-place.

I do not propose to review French administrative law beyond this brief introduction. It is sufficient for my purposes that a promising direction for the reform of Canadian law is provided by several hundred years of French public law. The French public law system avoids many of the problems associated with the Canadian private law perspective by formally recognizing the State's status as governor in the contractual arena and conceptualizing the public contract as being made between "essentially unequal parties."[113] This recognition enables the development of doctrines which expressly protect the individual while enabling the State to act consistently within its duty to the public. The doctrines are intended to preserve the individual-State relationship and to advance the common good.

In light of the normative ordering which I have argued binds the Canadian State in all that it does, it is my position that Canadian public law would be enhanced by an adoption of comparable principles. These principles are competent to provide a mandatory gloss on standard form contracts and individually negotiated contracts which contain a Canadian equivalent of the clause exorbitante. Such a clause signals the State's position of preeminence, the individual's vulnerability, and so the need for minimum safeguards. Application of the principles discussed above would thereby make the State accountable to the individual contractor both as a citizen and as a contractual party in situations where equality of bargaining is only nominally present. As the English court asserts in Attorney General v. De Keyser's Royal Hotel:

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[113] Ibid at 125-126.

> [It is] equitable that the burdens borne for the good of the nation should be distributed over the whole nation and not be allowed to fall on particular individuals.[114]

b. reconceptualization of the standard form contract through industry consultation

Reciprocity and solidarity--both contractual and liberal democratic--would be enhanced if the State were to formulate its standard form contracts on the basis of consultation with industry.[115] Information sharing and cooperation are likely to produce a more consensual, less autocratic standard form Government contract and one which would achieve public objectives in a manner consistent with the State's ongoing duties to the individual.[116]

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[114] [1920] A.C. 508 at 553 (H.L.).

Note that it is beyond the scope of this thesis to consider whether Canadian public law should be applied by a separate tribunal or not. There is academic opinion on both sides of the issue. Brown and Garner, for example, have faith that a dual system would be workable, supra note 45 at 96. Bishop, on the other hand, is opposed on the basis that "dual courts inevitably create demarcation issues that prolong review," supra note 3 at 525. As an alternative, he points out that several common law jurisdictions have simply created an administrative division within the ordinary judicial system or designated specific judges as administrative law judges, at 526. See too Hogg's commentary opposed to a dual system, supra note 48 at 2, that of Bernard Schwartz, French Administrative Law and the Common Law World (New York: New York University Press, 1954) at 316 as well as Street's assertion that a separate administrative Court is "out of harmony with Anglo-American constitutional notions of the judges as independent persons" supra note 45 at 186.

[115] William Whitford, supra note 57 at 554 points out that in Germany, there is a "tradition of bargaining" amongst the drafters of standard form contracts, "trade associations of manufacturers or sellers, and organizations representing the adhering parties, often consumers."

[116] There is already at least one Canadian precedent for this strategy although the result could have more productive. In 1972, the Canadian Business Equipment

(continued...)

c. Due regard for contractual commitments

The principles of solidarity and reciprocity place a heavy duty on the State to respect the requirements of its contractual relationships, however conceived. For if the State were to act without regard to its formal commitments, the individual's trust in any subsequent State assurance would be eroded.[117] Such conduct would also be contrary to the dictates of justice.

There is enormous debate amongst contract law scholars as to whether breaching a contract--that is, failing to perform in manner consistent with the default rules set out in the contract[118]--constitutes simply breaking a promise[119] or

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[116] (...continued)
Manufacturers Association assembled a task force to work with the federal Department of Supply and Services "in an attempt to come up with a set of terms and conditions which would better reflect reality." See Murray, supra note 86 at 6. By 1976, however, the Government decided that there were "certain rights at law which the Government was not prepared to contract away," ibid. Its only concession was to become more willing to accept supplemental terms and conditions to its standard form contracts, ibid at 7.

[117] This conception of State liability is based on regarding the State as a "model contract holder." According to Margaret Allars, this means the State is expected to act

> with propriety, common sense, commercial morality and principles of good administration, and act in accordance with expectations it has generated in its commercial dealings and the interests of the public both in achieving social goals and wise expenditure of public funds. If government does not honour its promises, which induce expectations in members of the public, harm will be done to the ultimate value of reciprocity between government and governed. The rule of law requires that the law of contract be respected by government for the very purpose of securing such reciprocity.

See "Administrative Law, Government Contracts and the Level Playing Field" (1989) 12 University of New South Wales Law Journal 114 at 118.

[118] As Richard Craswell points out in "Contract Law, Default Rules, and the Philosophy of Promising," (1989) 88 Michigan Law Review 489 at 494, respecting a (continued...)

acting in a manner which is contrary to a matrix of understandings contained in a complex social relationship.[120] There is even debate as to the nature of the

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[118](...continued)
contract does not limit one to performance: "promises do not exclude all other considerations, thereby leaving the promisor under an absolute obligation." One need only act consistently with the contract's default rules, that is, rules which provide when a party is entitled to resile.

[119] Charles Fried, for example, relies on the discrete transaction foundation of classical contract theory when he argues that "the promise principle..is the moral basis of contract law." See Contract as Promise: A Theory of Contractual Obligation (Cambridge: Harvard University Press, 1981) at 1. Accordingly, breaching a contract is a massive betrayal:

> The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust....An individual is morally bound to keep his [sic] promises because he has intentionally invoked the convention whose function it is to give grounds--moral grounds--for another to expect the promised performance. To renege is to abuse a confidence he was free to invoke or not and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. A liar and a promise-breaker each use another person.

See at 16.

Fried's approach has been criticized as being both reductionist and outmoded. See, for example, Macneil, "Values in Contract" supra note 55 at 390-397; Macneil, "Relational Contract" supra note 55 at 520; P.S. Atiyah in his book review of Fried's Contract as Promise, (1981) 95 Harvard Law Review 509 at 516-520; Robert Hillman, obliquely, in "The Crisis in Modern Contract Theory" (1988) Texas Law Review 103 at 123 (Hillman writes: "A highly abstract core theory simply cannot exercise dominion over the entire field" (references deleted); and B.J. Reiter, "Good Faith in Contract" (1983) 17 Valparaiso University Law Review 705 at 719-723.

[120] Nonetheless, even those who subscribe to relational contract theory acknowledge a promise component in contract. As Philip Mulloch describes it, a contract is:

> the relations of the parties to the processes of projecting exchange into the future, and is not limited to promise in exchange. Indeed, promise is only a fragment of any contractual relation, no matter how discrete.

(continued...)

promise broken.[121] I do not propose to enter into these controversies here. Regardless of how the contractual relation is understood, it does involve, at minimum, reliance on conventions and the implied consequences of conventional action. Mulloch describes the matter as follows:

> It is conventions that make our social life possible; and conventional action depends on our being in agreement about something--in the case of communication, the practical necessity of truthfulness; in the case of promising, the practical necessity of performing--which, of course, does not require that an agreement has been made in the sense of giving promises to each other. Our being in agreement about a certain kind of co-operative or co-ordinated action is what is meant by a convention; and the action typically covered thereby is what I shall call conventional action.....The essential feature of any kind of conventional action is "(non-accidental) interpersonal mutuality of reference at the level of intentions."[122]

Put simply, to enter into a contractual relationship, the State conducts itself in a manner which gives rise to social expectations. Should it invoke the social practice of contracting with recklessness, dishonesty, or with disregard for its logical consequences, it thereby jeopardizes the solidarity and reciprocity required in the individual-State relationship. Whether solidarity and trust is compromised through an express breach (promise-breaking) or less directly (by acting in a manner contrary to the relational values contained in the contract) is moot. The meta-theoretical

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[120](...continued)
See "The New Paradigm of Contract: A Hermeneutical Approach" (1983) 17 Valparaiso Law Review 677 at 678.

[121] See Craswell, supra note 118 at 493-495 where he notes at least two promise-based accounts of why contracts must be kept.

[122] Mullock, supra note 120 at 681 (references deleted). Mulloch suggest that Macneil would not agree with this definition of conventional action because Macneil's relational model focuses on consent, not intention. Nothing turns on this difference for my purposes.

relationship in the Canadian State concept between idea and practice, between form and conduct, forbids both.[123]

3. Role Integrity

a. The State's exercise of its contractual power must conform with constitutional imperatives and statutory duties

The Supreme Court of Canada has already recognized the need for a measure of role integrity in all that the State does. Indeed, as discussed in Chapter Two, the court has held that the exercise of State power--whether derived from "statute, common law or prerogative"--must be adapted to conform with "constitutional imperatives."[124] In this way, the court denies the possibility of fragmenting the State's identity into those aspects which must conform to constitutional values and those which do not. At least with regard to certain threshold matters--such as respect for the supreme law of Canada[125]--the State is taken as one piece. This same enforcement of an integrative standard is manifest in the common law proposition that the State cannot by contract fetter its statutory powers.[126] In short, the State is held to a specialized standard of conduct for the very reason that it is not an individual.

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[123] Pace Dicey, I do not intend to claim here that the State must be subject to the identical legal principles which bind the individual. I am only arguing that the State must respect the rules which apply to it.

[124] Air Canada v. Attorney General of British Columbia [1987] 1 W.W.R. 304 at 309 (S.C.C.).

[125] Whether an individual ought to be entitled to contract out of his or her right not to be discriminated against on the basis of age remains a judicially unresolved issue. See my discussion, supra Chapter Two at 72, footnote 72.

[126] See my discussion of this rule, supra Chapter Two at 74-75.

The normative constituent of role integrity requires further judicial development, however, more closely to demarcate the scope of acceptable State behaviour and the consequences for violation. A serious deficiency in Canadian public law, for example, is the absence of assured compensation for individuals who enter into a contract with the State which is ultra vires or purports to constrain legislative authority.[127]

Because role integrity influences conduct, it overlaps with the norms requiring the State to have regard for the individual, maintain propriety of means, and seek to harmonize conflict. My commentary in the next section of this Chapter will therefore also constitute a gloss on what rules would produce an integrative State presence in the market-place.

4. Making justiciable respect for the citizen, propriety of means, and harmonization of conflict

a. Introduction

Since the Supreme Court of Canada's decision in Nicholson v. Halimand-Norfolk Police Commr. Bd.,[128] the courts have increasingly held State officials to a duty of fairness.[129] The procedural quality of this duty is consistent with Canadian liberal democratic values because it opposes any "surrogate political process"[130] within the judiciary. As expressed by the English court in Chief Constable of the North Wales Police v. Evans: "Judicial review is concerned, not with the decisions, but with the decision making process."[131] This restraint reflects the perspective that "unbridled judicial review" may "erode the foundations of legislative supremacy and political responsibility."[132]

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[127] A contract which is incompatible with the State's legislative obligations fails. The individual is without remedy unless the matter sounds in restitution. See Faulker's discussion, supra note 1 at 81-82.

[128] [1979] 1 S.C.R. 311.

[129] See the historical account given in David Jones and Anne de Villars, Principles of Administrative Law (Toronto: Carswell, 1985) at 162-189.

But of course, the distinction between the substantive and procedural review of State conduct is highly problematic because "process values are also substantive values,"[133] and because "the flight from substance must end in substance."[134] It is also highly problematic because any account of public law which purportedly keeps judges out of the political arena and casts them as objectively upholding neutral standards of review cannot succeed.[135]

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[130] G.L. Peiris, "Wednesbury Unreasonableness: The Expanding Canvas" (1987) 46 Cambridge Law Journal 53 at 53, quoting with approval R.B. Stewart "Reformation of Administrative Law" (1975) 88 Harvard Law Review 1669. See too Jones and de Villars, ibid: "Judicial review is not an appeal on the merits and it is dangerous constitutionally for the courts to arrogate to themselves appellate powers which the legislative branch has not given them," at 191 (references deleted).

[131] [1982] 1 W.L.R. 1155 at 1173 (H.L.).

[132] Peiris, supra note 130 at 53.

[133] D.J. Gallant, Discretionary Powers: A Legal Study of Official Discretion (Oxford: Clarendon Press, 1986) at 237.

[134] Ronald Dworkin, "The Forum of Principle" (1981) 56 New York University Law Review 469 at 516.

[135] See my discussion of Gallant and Dworkin, infra at 156-159. See too Hutchinson's perspective, supra note 13 at 91:

> The question is not 'when, if at all, should judges step into the political arena?' but what they should do there, for they are never not in the political arena [references deleted].

In this next section, I will argue that the difficulties of separating substance from form, and political matters from judicial ones, ironically can be met through expressly politicising Canadian public law. This is not to make public law the prey of duplicity or opportunism or deception. Politicisation means subjecting public law to political theory and emphasizing the link between how the State is conceptualized--what theory says it is--and how it ought to conduct itself in contractual relationships. This, in turn, requires an alignment amongst the idea of the Canadian State, standards of Government conduct, and the scope of judicial review.

Linking the law to State theory is commonplace in several Western European countries.[136] Under this tradition, the State's institutional conduct is located within a framework of public values[137] which are identified and elaborated upon by administrative tribunals.[138] The object of public law is to make institutional conduct coincide more closely with the idea of the State and vice versa. Enforced bilaterality is important given that the State concept, as discussed in Chapter One, comprises both idea and institution. The express duty of the administrative tribunal is not to respond to conflict on a piecemeal basis but to systematize general public law principles. Public law within these countries is expressly powered by ideology.

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[136] Kenneth Dyson, The State Tradition in Western Europe: A Study of an Idea and Institution (Oxford: Martin Robertson, 10980) at 17-18 asserts:

> The intellectual 'strangeness' of the continental European state tradition is compounded by its association with the idea of law as the articulation of the state, and the dominant role of lawyers in theorizing about the state and in its administration. Hence the student of this tradition must be prepared to deal in juristic categories and to see behind the emphasis on the legal dimension of public life the expression of a distinct culture involving attitudes about the nature of law, about the role of law in society (both as a normative commitment to certain political values and as a regulator of institutions), and about how law should be made, applied and studied.

[137] Ibid at 271.

[138] Ibid at 115. Dyson notes, at 233,

> A separate system of administrative courts is concerned with developing its general principles and legal categories which attempt to take account of the inherent differences of position between public authorities and private individuals.

While politicisation of law--referencing legal claims against political theory--is a dramatic proposal within an Anglo-American positivist tradition, it has already been advocated, in varying forms, by several Anglo-American theorists. Gallant, for example, argues for judicial "politicisation within the public law "[139] and emphasizes the need for administrative law to be expressly located within political theory.[140] This process means that

> issues about democratic principles become more intricately woven into the issues that arise for [judicial] review. Questions about fair procedures and the representation of interests--what interests are to be considered, what constitutes consideration--are central to the development of judicial review within the public law model, and can only be answered within some theory of democracy.[141]

And so, the judge requires a theory of democracy including a perspective on

> the relationship between individuals and the State, and between minority and majority groups. It would include development of basic notions of rationality, purposiveness, and moral principles. It would also be concerned with the relationship between the courts and other institutions, especially the legislature and administrative authorities.[142]

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[139] Supra note 136 at 238.

[140] Ibid at 239.

[141] Ibid at 238.

[142] Ibid at 239.

In essence, Gallant is arguing that a properly functioning public law system requires a theory of the State.[143]

Express politicisation of law is also advocated by Ronald Dworkin as a strategy for the judicial resolution of constitutional questions. Dworkin's thesis is that judges must answer questions of constitutional interpretation within political theory[144] because there is no other cogent or realistic alternative:

> Learned Hand warned us that we should not be ruled by philosopher-judges even if our judges were better philosophers. But that threat is and will continue to be a piece of hyperbole. We have reached a balance in which the Court plays a role in government but not, by any stretch, the major role. Academic lawyers do no service by trying to disguise the political decision this balance assigns to judges. Rule by academic priests guarding the myth of some canonical original intention [of the constitutional framers] is no better than the rule by Platonic guardians in different robes. We do better to work, openly

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[143] Allan Hutchinson dismisses Gallant's theorizing as "neo-classical," supra note 13 at 120. What particularly concerns him, at 121, is its focus on rationality:

> rationality, like 'reasonableness' is never a neutral standard, but represents certain values that themselves need to be justified by more controversial visions of constitutional justice" [references deleted].

But Gallant is not presenting rationality as an entirely neutral standard. He could hardly do so while at the same time advocating an express politicisation of public law. Gallant nonetheless does accept many of the standard ideological and epistemological assumptions of liberalism, including the possibility of a kind of rationality. Gallant, for example, argues that the exercise of power by officials ought to be rational, purposive and moral. At minimum, this requires, at 6:

> (a) that the exercise of powers be based on reasons, and that the reasons be applied consistently, fairly, and impartially; (b) that the reasons be intelligibly related to a framework of equally intelligible purposes, policies, principles, and rules (in general, standards) which can be seen fairly to fall within and be the basis of the delegated authority; (c) that in matters of procedure and substance there by compliance with general, critical considerations of morality.

[144] Supra note 134 at 498.

> and willingly, so that the national argument of principle that judicial review provides is better argument for our part. We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally become questions of justice. I do not call that religion or prophesy. I call it law.[145]

Dworkin is not suggesting in this passage that judges be relentlessly, recklessly, or dishonestly political nor that the historical separation of powers be abandoned. He is simply asserting that some judicial functions--including constitutional interpretation--implicate political theory on a fundamental level. Principled judicial outcomes are achieved when this implication is recognized and intently accomodated.

Gallant's and Dworkin's theses are relevant to my project here. As constitutional matters are foundationally tied to political values, so are administrative ones--both involve public law norms and the individual-State relationship. Indeed, the development and application of standards for State conduct in the market-place depend on what one considers the State to be in the first place. And so, political theory affects administrative law matters even when its role is denied or ostensibly suppressed.

I have attempted to make the case that public law must be politicised and, in accord with Dworkin and Gallant, I do not intend to argue that the political nature of public law judging is therefore unbridled. The object is to develop a concept of justiciability which constrains political input by judges but never pretends to eliminate it. Question of acceptable Government conduct must be referenced against the idea of the Canadian State in order to locate the political content of the debate. As discussed in Chapter One, this means accepting that liberal democratic theory can furnish principled reference points[146] and provide bounded choices.[147] It means accepting the existence of "doctrinal regularities differentiating law from purely ad hoc politics."[148]

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[145] Ibid at 518 (references deleted).

Within the concept of the Canadian State, the rationales for judicial review of governmental conduct in the market-place are threefold. First, review enforces the norm of role integrity discussed earlier by protecting the individual from illegal or unwarranted State power--a traditional objective of administrative law.[149] It thus repairs the contradiction generated when the State's institutional conduct conflicts with the idea of the Canadian State discussed in Chapter One.[150] For the same reason, judicial review enforces the norm that the contractor be treated with due respect and so reassembles the individual-State relationship through legal redress. Second, it manifests respect for the Rule of Law--which I earlier attempted to reconstitute through a Wittgensteinian conception of rules[151]--by articulating in advance the standards of conduct which are consistent with the State's normative obligations in the market-place.

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[146] Blum, supra note 41 at 120.

[147] Ibid at 135-138.

[148] Ibid at 71.

[149] Wade, Administrative Law (6th ed.) (Oxford: Clarendon Press, 1988) at 5 identifies the primary purpose of administrative law as keeping "the powers of government within their legal bounds, so as to protect the citizens against their abuse."

[150] See my discussion, supra Chapter One at 23-62.

[151] See my discussion of Margaret Jane Radin, supra Chapter One at 34-36.

The idea of the Canadian State also limits judicial review. Assuming for now a Canadian public law system which elevates the public interest, adopts French compensatory doctrines to protect the individual, and reflects the historical Anglo-American distrust of judicial law making, it follows that review of the State's discretionary power in contract ought to be relatively circumspect. As Gallant points out, discretionary authority has traditionally required a "degree of freedom and autonomy in officials in creating the decision standards and applying them."[152] Concerning this kind of authority,

> no claim may be laid to any specific outcome since the decision must be made which appears best to serve the public interest, as expressed in the objects of power. The only claim is of a lower order, namely that, because of the importance of the interests at stake, certain methods and procedures ought to be followed in deciding what action to take.[153]

Finally, the idea of the Canadian State suggests distinct grounds for judicial review which I will explore in the next section. Even if it were possible, it is well beyond the scope of this thesis to provide a catalogue of rules to govern the State in the market-place. My object is only to illustrate the generative and cohesive capacity of political theory in the public law realm. The following discussion is general and prolegomenary.

b. Rules of administrative fairness

The norm which requires that the individual be treated with due respect also requires government officials to adhere to rules of administrative fairness. For the reasons given above, these rules should be minimal, expressly tied to political theory, and subject to incremental judicial development.

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[152] Gallant, supra note 133 at 30.

[153] Ibid at 196.

It must be emphasized that treating the individual with due regard is not a revolutionary idea within Canadian administrative law and accordingly, assistance can be derived, in part, from existing principles, including the doctrine of legitimate expectation[154] and other notions of fairness. But instead of following the traditional, piecemeal strategy for the development of Canadian public law values,[155] the object is--albeit ambitiously--to seek "a rational and elegant synthesis of public law by relating judgments to principles derived from a coherent and evolving philosophy."[156] This Western European approach requires a systemization and express politicisation of common law insights.

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[154] As discussed in Chapter Two, the doctrine of legitimate expectation has been applied by numerous courts in Canada but has also been expressly rejected by Mr. Justice MacDonald of the Alberta Court of Queen's Bench. See supra Chapter Two at 81-83. Beyond the following commentary, it is not within the scope of this thesis to critique Mr. Justice MacDonald's reasoning.

In Hutfield v. Board of Fort Sask. General Hospital District No. 98 (1986) 49 Alta.L.R. (2d) 265 (Q.B.), affd. on other grounds (1988) 60 Alta.L.R. (2d) 165 (C.A.), Justice MacDonald found that the doctrine of legitimate expectation--conceived here as the requirement of procedural protection commensurate with the individual's legitimate expectations regarding it--did not "reflect a principle that can withstand scrutiny in the light of the object of judicial review by certiorari" at 267. Yet, if the object of certiorari is to quash administrative decisions which breach fair procedure, cannot its reach be extended? It is true that inconsistency in State policy regarding procedure may not be unfair standing alone. However, within a normative context requiring respect for the individual, policy changes may amount to an abuse of discretion "particularly when undertakings or statements of intent are disregarded unfairly or contrary to the citizen's legitimate expectation." See Wade, supra note 149 at 423.

So constructed, legitimate expectation has expansive possibilities. As Wade points out at 424, this kind of review "may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly" (references deleted).

[155] According to Dyson, supra note 136 at 233-234, there has been a generalized British failure to link administrative law to the State concept. He notes that

> A characteristically medieval confusion of public and private responsibility remains. The common-law system is caught up in a web

(continued...)

I have already discussed the British doctrine of legitimate expectation in Chapter Two. It is an evolving, sometimes unclear concept which nonetheless sets out at least the threshold requirements of acceptable State conduct which I argue must also be met in the Canadian market-place. In short, this means that the State cannot engage in illegal behaviour, in conduct which is unreasonable in the "Wednesbury" sense,[157] nor in ways which are procedurally improper.[158]

Indeed, it is patent that the State's contractual conduct must be legal. The Rule of Law contained in the idea of the Canadian State makes this so as does respect for the individual, society, and ideals of justice. This fixes a limit on what the State can do in furtherance of the public good by forbidding an illegal means to a collective end.

It is as patent that unreasonable or irrational official behaviour should receive judicial sanction. As Peiris summarizes it, "Wednesbury" unreasonableness impugns:

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[155] (...continued)
of medieval government immunities and concepts which have not permitted the evolution of a coherent body of public law.

[156] Ibid at 233.

[157] 'Wednesbury' unreasonableness refers to unreasonableness identified in the leading English case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223. It is "a general description of things that must not be done," at 229.

[158] See Lord Diplock's summary of the three arms of legitimate expectation in Council of Civil Services v. Minister for Civil Services [1985] A.C. 374 at 410 (H.L.). I quote his judgment at length in supra Chpater Two at 79.

"misdirection, improper purpose, disregard of relevant considerations and advertence to immaterial factors."[159] It therefore has a substantive aspect:

> The hallmark of the Wednesbury connotation of unreasonableness is that the repository of a discretion, although acting within the four corners of the legislative grant of discretion, has arrived at a decision which is repugnant to all reason.[160]

More problematic is holding the State's contractual conduct to the third arm of the doctrine of legitimate expectation. This arm impugns decisions which are the product of procedural impropriety. The central difficulty is determining when procedural impropriety ought to be tolerated and when the impugned State conduct should be subject to judicial redress. As discussed earlier, Canadian administrative law already holds the State to standards of procedural propriety in the contractual arena--it is simply not clear when it will do so and on what basis.[161] In Thomas Assaly Corp. v. Canada, for example, the court held that the Government owed a duty of fairness to individuals submitting tenders because acceptance or rejection "directly affects the interests of that person invited to bid."[162] Accordingly, the court set aside the outcome of a procedure which called for bids without identifying the issues which competitors had to address "to have a chance of succeeding."[163]

To advance the insights of Assaly and to chart with more determination the boundaries of acceptable State behaviour require that questions of procedural propriety be considered within the context of political theory. Hence, (and as the court in Assaly points out) individuals are entitled to fair treatment from the State when personal interests are affected. This entitlement is derived from notions of individual autonomy discussed in Chapter One.[164] On the other hand--and this is what the court does not address--a principled line must somehow be drawn between protecting private interests and unduly constraining the State's freedom to act. This opposing principle arises from the State's solemn obligation consistently to act in the public good. Officials make decisions about contractual relationships all the time which--were they subject to high levels of judicial scrutiny--would erode discretion, displace the priority of the public interest, and be uneconomic.

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[159] Peiris, supra note 130 at 54.

[160] Ibid at 55.

[161] See my discussion, supra Chapter Two at 75-78.

[162] Supra note 5 at 158.

[163] Ibid at 159.

While there is no one resolution to the competing interests present in Assaly, political theory, and rules emanating therefrom can advance the debate more systematically. Assistance can be derived, for example from exploring "the cornerstone of democratic political systems,"[165] namely, individual participation in the decision-making process. Importing this value into questions of fair procedure would require the State to consult with individuals when making contractual decisions affecting them. Consultation is appropriate because it has three effects. First, it contributes to "instrumental rationality, since the parties most affected by an action may be able to offer information and argument which would enable a better decision to be made."[166] Second, it helps to prevent arbitrary results.[167] Third, "rights to interchange express the elementary idea that to be a *person*, rather than a thing, is at least to be consulted about what is to be done with one."[168]

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[164] See discussion, supra Chapter One at 41-43.

[165] Gallant, supra note 133 at 334.

[166] Ibid at 333.

Gallant combines the arguments for individual participation in the State exercise of discretion as follows:

> Part of the justification consists not only in outcomes, but in showing that the outcomes have been reached by justifiable methods and rules. W. N. Nelson suggests that the central concept is open government; participation contributes to open government, open government contributes to the need to justify official actions in terms of morally acceptable principles, and the need to justify contributes to better decisions. The other part of the argument is that those participating in government are required also to develop their sense of moral principles in order to evaluate and criticize decisions. In this way, the justification of participation in public decision-making is based on the interwoven ideas of community and personal improvement....Although the links between participation and this sense of communal and personal improvement are ultimately empirical, they are sufficiently intuitively compelling to be accepted as a working basis for the importance of participation in discretionary decisions.[169]

What rules would the requirement of individual participation imply for the State contract? While there is obviously no single answer to such a question, public law values assist in generating specific possibilities. For example, the value of individual participation may place on the State a mandatory obligation to publish all policies and rules affecting its contracts, including departmental directives, orders and guidelines.[170] This flows from the likelihood that consultation cannot properly

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[167] (...continued)
[167] *Ibid*.

[168] Gallant quoting Lawrence Tribe, *ibid*.

[169] *Ibid* at 335.

[170] For example, T.G. Ison, "The Intrusion of Private Law in Public Adminstration" (1976) 17 Cahiers de Droit 799 at 805 quotes the following passage from the Special Committee on Statutory Instruments, 1968-69 at 29:

(continued...)

occur when one party is denied the information required to participate.[171] This same value may imply a positive obligation on the State to advise the individual of public interest matters which would affect or potentially affect the substance of the contract. It may require that the State's contractual control over a public works project be made subject to mandatory, good faith consultation with the contractor. Consultation may also be appropriate should the State wish to invoke its standard termination for convenience clause or unilaterally amend the contract. Indeed, depending on the size and nature of the contract at issue, judicial proceedings arguably ought to be a precondition to the State cancelling or substantially altering its contractual position with the individual. At minimum, the value of participation would require the provision of written reasons for termination or unilateral amendment both to establish the bona fides of earlier consultation as well as demonstrate regard for the dignity of the affected individual.

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[170] (...continued)

> that all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and also subjected to parliamentary scrutiny.

See too Gallant's discussion, ibid at 270-271.

Note that, pursuant to Alberta's Financial Administration Act, R.S.A. 1980, c. F-9, there is no statutory obligation on the Provincial Treasury Board to publish its directives on Crown contracts formulated pursuant to section 79(1) nor is there any publication requirement on the Provincial Treasurer when he or she issues directives concerning Crown contracts pursuant to section 36.

[171] See the Court's discussion of this point in Thomas Assaly, supra note 5 at 159.

Further examples could be given. My object here, however, is merely to demonstrate how the identification of express values provides a promising, cohesive stra[illegible] for the reform of Canadian public law. As the foregoing discussion illustrates, the value of participation--being derived from liberal democratic theory--facilitates propriety of means regarding contractual decisions by the State, enforces respect for the contracting individual, and seeks to harmonize conflict. Its politicising effect contributes to the preservation of the individual-State relationship.

One could, of course, object that requiring the State to meet specialized standards in the market-place, including consultative obligations, leaves it needlessly hamstrung and unable to compete. But there are several replies to this. First, in selecting procedures and standards for review, the objective is not to determine the most intense form of scrutiny. The standard of consultation would be weighted with regard to the importance of the interest at stake.[172] This would involve an assessment of "the costs and benefits of procedures in order to achieve marginal gains in outcomes."[173]

Second, it is contrary to liberal democratic theory to elevate notions of competition and efficiency over duties of governance. Within the realm of administrative matters,

> the primary object is not to profit from some marketable commodity, but to achieve stated goals...The overall test of success in such cases is the extent to which the respective goals have been achieved. It is useful then to distinguish between efficiency and effectiveness; efficiency

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[172] See Gallant's formulation, *supra* note 133 at 332 and 360.

[173] *Ibid* at 328.

> pertains to the relationship between resources and outcomes, while effectiveness refers to realization of goals.[174]

The conception of public law I have offered identifies a goal of the State contract to be fulfilment of the public good in a manner consistent with the individual-State relationship. These pivotal liberal democratic values cannot be disregarded in the name of short-term, cost saving goals.

Third, the specialized standards of behaviour discussed in this Chapter are not inherently opposed to efficiency. As Macneil points out, relational factors exist in all contracts--not just in the individual-State one--because it is through cooperative, relationship-preserving behaviour that both parties attain their contractual objectives.[175] It follows that actors in both private and public contracts must meet similar standards. The critical difference which flows from a public law model is that failures in the Government contract are more justiciable because State disregard for relationship preserving values is contrary to the solemn tenets of liberal democratic theory and so to the idea of the Canadian State.

5. Conclusion

Throughout this Chapter, I have attempted to demonstrate that the inequities generated by a private law conception of the State contract ought to be redressed through a system which acknowledges the State's adhering status as governor. I have argued that subjecting the State to specialized standards is required by liberal democratic theory and merely builds on existing common law insights.

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[174] Ibid at 129.

[175] As Macneil remarks in "Values in Contract," supra note 55 at 365:

> On the face of it, the relational norms appear to be contrary to notions of economic efficiency; but the basic failure of the microeconomic model to take always-present relational factors into account render such conclusions highly suspect [references deleted].

I have also argued in favour of accepting the role of political theory in the judicial review of public law matters. Resolutions to legal questions involving the individual-State relationship are inevitably politicised. This means that a properly functioning public law system must recognize and refine the role of theory--including conceptions concerning how the Canadian State ought to be regarded--instead of concealing its presence.

V. CONCLUSION

This thesis has endeavoured to show that the private law model of State liability is largely irretrievable because its analogical premise cannot be sustained. It has argued, instead, for the possibility of a unified theory of public law through the development of administrative norms and standards to govern the State when it is in the market-place. It has contended that a cohesive public law system must rely on the insights of political theory, that the propriety of governmental conduct can only properly be measured against what the State is considered to be in the first place. Throughout, this thesis has favoured a meta-theoretical understanding of what the State is--one which emphasizes the interrelationship between form and practice, between idea and institution, between action and reflection. Accordingly, it locates the Canadian State in both Government activity and the values and distinctive qualities which are ascribed to the State independently of its conduct. And, finally, this thesis has attempted to show that an understanding of the Canadian State which identifies as core the fluctuating values of liberal democratic theory can--

notwithstanding its dynamism--provide useful reference points for administrative law. These values circumscribe and provide parameters to questions of State conduct and contractual liability.

While the public law model I have proposed is not without its own dangers, it does have directness to recommend it. The model acknowledges the State's ongoing status as governor regardless of its activity. It highlights the public-private tension in the State contract and so brings to the surface the inevitable project of interest ranking. Building on the common law principle that the State can only enter into contracts which are in the public interest, the model seeks to elevate more consistently that latter interest, accepting that public and private objectives do not always coincide. Individual rights and interests, on the other hand, are maintained through a normative ordering which constrains State conduct in the market-place and shelters the individual from adverse economic consequences when the State cancels or amends its contractual obligations. Finally, the model requires judges to speak openly and clearly, to systematize their pronouncements, and formalize the importance of political theory in disputes between individual and State. It encourages the creation of a Canadian public law system by design, not default.

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